Supreme Court, U.S.
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No. 06- 06-215

IN THE

Supreme Court of the United States

AMIEL CUETO,

Petitioner,

v.

E. A. STEPP, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

There is a conflict between the circuits on the important question of whether the rule of *Crawford v. Washington*, 541 U.S. 36 (2004), is retroactive to cases on collateral review. The Seventh Circuit, joined by the Second and Tenth, holds that it is not. The Ninth Circuit holds that it is. In the case at bar, the federal prisoner Amiel Cueto was convicted of obstruction of justice (18 U.S.C. § 1503), and conspiracy to obstruct (18 U.S.C. § 371), on the basis of unconfronted grand-jury testimony from a co-defendant who had pleaded guilty before trial; and also on the basis of two tape-recordings of the unconfronted testimony of a law enforcement agent. (The prisoner Amiel Cueto was not recorded on either tape, nor was he even present when the tapes were made.) The prosecution was free to call the co-defendant and the agent, but it chose not to. The defense sought to call them, but was barred from doing so.

This case also presents an important question of jurisdiction for a federal prisoner under 28 U.S.C. § 2241. There is no doubt about the fact that Amiel Cueto is actually innocent and that his remedy under 28 U.S.C. § 2255 is inadequate to test the legality of his detention.

Two questions are presented which warrant this Court's review.

1. Is the rule of *Crawford v. Washington*, __ U.S. __. 124 S. Ct. 1354 (2004) retroactive to cases on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989)?

2. Is there jurisdiction under 28 U.S.C. § 2241 for the claim of a federal prisoner who has exhausted his remedies on direct appeal and under 28 U.S.C. § 2255, when there is no doubt about the prisoner's actual innocence, because an intervening change of law has rendered the prisoner's crime non-existent?

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OPINIONS BELOW

The Seventh Circuit Court of Appeals affirmed the dismissal of Amiel Cueto's Application for Habeas Corpus in an Order dated March 10, 2006. (App. A) The Order held there was no jurisdiction under 28 U.S.C. § 2241, and summarily affirmed the dismissal without allowing the prisoner to file briefs or to orally argue. This Order is the judgment that is the subject of this appeal. The Seventh Circuit denied Cueto's Petition for Rehearing on May 12, 2006. (App. C) The district court's Order and Memorandum is dated December 15, 2005. (App. B)

JURISDICTION

The judgment of the Court of Appeals was entered March 10, 2006. The Court of Appeals denied Amiel Cueto's Petition for Rehearing on May 12, 2006. This Petition for Writ of Certiorari is filed on or before August 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, Section 9, Clause 2, states in relevant part: "The Privilege of the Writ of Habeas Corpus shall not be suspended".

U.S. Constitution, Amendment I, states in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

U.S. Constitution, Amendment V, states in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law".

U.S. Constitution, Amendment VI, states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be . . . confronted with the witnesses against him".

18 U.S.C. § 371, states in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned.

18 U.S.C. § 1503, states in relevant part: "Whoever corruptly, . . . influences obstructs or impedes, or endeavors to influence, obstruct or impede the due administration of justice, shall be punished".

28 U.S.C. § 2241, states in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction. . . . (c) The writ of habeas corpus shall not extend to a prisoner unless – (1) He is in custody under or by color of the authority of the United States . . . or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2255, states in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . . An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. . . .A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

The prisoner Amiel Cueto was a lawyer and publisher of a newspaper of general circulation called the East Side Review. Cueto practiced law and published the East Side Review in the metro-Illinois area, east of St. Louis, Missouri. Bonds Robinson was a law enforcement agent with the Illinois Liquor Control Commission. Miriam Miquelon was an Assistant U.S. Attorney in the Southern District (East St. Louis) of Illinois. Robert Haida was the local state prosecutor, the state's attorney of St. Clair County, Illinois. Thomas Venezia was one of Amiel Cueto's clients. Cueto represented Venezia in several matters, including a civil case against Bonds Robinson, which alleged that Robinson had used his power over Venezia's liquor license to attempt to extort money from Venezia.

In early January 1995 Amiel Cueto announced he would run for the office of St. Clair County State's Attorney. On January 30, 1995, Cueto wrote and published a three-paragraph editorial in the East Side Review (App. P) entitled: "LOCAL JUSTICE DEPARTMENT NAZIS WHO ALSO MAY BE PROSECUTED BY STATE AUTHORITIES". The editorial reported that state's attorney Robert "Haida had a lead-pipe cinch perjury case against FBI surrogate, Bonds Robinson". The editorial referred to AUSA Miquelon and an FBI Agent named Taylor, as "Nazis".

In November of 1995, Bonds Robinson filed a defamation and civil rights lawsuit (42 U.S.C. § 1985), against Amiel Cueto and his corporation which published the East Side Review. Robinson's complaint named other defendants, and was filed in the U.S. District Court for the Southern District of Illinois, 95-864-WDS. Unknown to

Cueto at the time, and only discovered during depositions in a Missouri civil case in 1999 (long after Cueto's direct appeals had been exhausted), AUSA Miriam Miquelon was secretly acting as counsel for Robinson in this civil case against Cueto: Representing Robinson in *ex parte* hearings, making *ex parte* motions to seal records, advising on pleadings, and using her office to recruit other lawyers for Robinson in his civil case against Cueto.

On February 9, 1996, Cueto filed responsive pleadings to Robinson's case, in which he noticed that he planned to depose Miriam Miquelon, among others. On February 14, 1996, Robinson dismissed his own civil case. On February 20, 1996, Cueto moved for attorney's fees under 42 U.S.C. § 1988, asking for more than $37,000 against Robinson and his counsel. As Robinson's civil lawyer, Miquelon was potentially liable to Amiel Cueto for this $37,000-plus in fees. (In 1998, after Cueto had been sent to prison, the district court denied Cueto's motion for attorney's fees.)[1]

On July 18, 1996, Amiel Cueto was indicted, and the Indictment was sealed. On August 9, 1996, the Indictment was unsealed, and it charged Amiel Cueto, Thomas Venezia, and Cueto's investigator Robert Romanik. Cueto himself was charged with five counts of obstruction of justice (18 U.S.C.

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1. Cueto claimed in the habeas proceedings below, that two depositions in the Missouri court case: *Nineteen Sixty-Seven Corporation v. Bonds Robinson, Jr.*, No. 992-01681 (City of St. Louis, 1999), established that Ms. Miquelon had acted as counsel for Robinson in his civil case against Cueto. (*See* App. D.) Cueto also claimed that Ms. Miquelon had violated 18 U.S.C. § 208 and the "categorical rule" of *Young v. Vuitton*, 481 U.S. 787, 814 (1987). However, Cueto was not allowed discovery or an evidentiary hearing, and his claim on this point was denied.

§ 1503), and two counts of conspiracy to obstruct (18 U.S.C. § 371). The proceedings which Cueto was alleged to have obstructed, all involved his client – Thomas Venezia. Venezia pleaded guilty before trial and testified against Cueto. Romanik also pleaded guilty before trial.

Judge Stephen N. Limbaugh from the Eastern District of Missouri, was assigned in September 1996 to preside over Cueto's case. (All the judges in the U.S. Southern District of Illinois had recused themselves.) Miriam Miquelon was the lead prosecutor in all the proceedings against Cueto. Cueto moved in September 1996 to disqualify Miquelon, but the motion was denied.

Cueto's trial began on April 7, 1997, and ended on June 11, 1997. The jury acquitted Cueto of two counts of obstruction of justice and one count of conspiracy, but found him guilty of three counts of obstruction, and one count of conspiracy.

On September 19, 1997 Cueto was sentenced to 87 months in prison, to be followed by two years of supervised release; he was fined $80,000, and assessed five hundred dollars for each month of imprisonment, as costs of incarceration. Cueto was ordered to report (and did report) to the maximum-security penitentiary at Springfield, Missouri on October 1, 1997.

Cueto's conviction and sentence were affirmed. *U.S. v. Cueto*, 151 F.3d 620 (7th Cir. 1998). On March 22, 1999, this Court denied Certiorari. 526 U.S. 1016. Cueto moved for relief under 28 U.S. 2255, but Judge Limbaugh denied the motion on August 18, 2000. Judge Limbaugh and the Seventh Circuit denied Cueto a Certificate of Appealability, and this Court denied Certiorari. 533 U.S. 952.

On July 19, 2002, from the federal prison in Marion, Illinois, Cueto, pro se, filed the Application For Writ of Habeas Corpus under 28 U.S.C. § 2241 that is the subject of this appeal. *Cueto v. Stepp*, 02-777 (So. Dis. Ill.) Numerous pleadings were filed in 2002 and 2003, and in December of 2003, the Honorable John D. Tinder from Indiana was assigned to preside over the case at bar. In 2004 and 2005, many more pleadings were filed, and one limited evidentiary hearing (only deputy U.S. district clerks were allowed to testify) was held.[2] On December 15, 2005, Judge Tinder denied Cueto's motions for discovery and/or an evidentiary hearing, and dismissed Cueto's Application for lack of jurisdiction under 28 U.S.C. § 2241 (App. B). The Seventh Circuit ordered that no briefs be filed, and asked for memoranda on jurisdiction. Each party filed a memorandum.

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2. This hearing was only concerned with Cueto's claim that the Indictment that was unsealed on August 9, 1996, was not the true bill of the grand jury. Cueto made the allegation in October 2003, that the Indictment that had been returned on July 18, 1996, had named U.S. Congressman Jerry Costello; but that Ms. Miquelon had removed the Congressman and had altered the Indictment while it was under seal, without going back to the grand jury. The evidence that was revealed after Cueto made the claim, seemed to support his allegation. Judge G. Patrick Murphy was presiding over Cueto's habeas claim, and he issued an order on November 21, 2003, in which he reported that the "ballot (the foreperson's record of the number of jurors concurring in every indictment) in Cueto's underlying criminal case is missing from the official records kept by the Clerk". At the April 30, 2004 hearing, AUSA Ferguson reported that the July 18, 1996 transcript of the grand jury proceedings in Cueto's case, "could not be located among the records of the U.S. Attorney's Office". Finally, the tape recording of the hearing before the Magistrate on July 18, 1996 which reported Cueto's Indictment to the Court, was found to be erased. (This was the only record of the proceeding.) However Cueto's habeas claim on this point was denied by Judge Tinder.

On March 10, 2006, the Seventh Circuit issued a two-paragraph Order which summarily affirmed the dismissal for lack of jurisdiction. (App. A) On May 12, 2006, the Seventh Circuit denied Cueto's Petition for Rehearing. (App. C) This Petition for Writ of Certiorari was filed on or before August 10, 2006.

REASONS FOR GRANTING THE PETITION

The Circuits are split over whether the rule of *Crawford v. Washington* is retroactive to cases on collateral review under *Teague v. Lane*. The Seventh Circuit in *Bintz v. Bertrand*, 403 F.3d 859 (2005) held that *Crawford* is not retroactive. The Second Circuit in *Mungo v. Duncan*, 393 F.3d 327 (2004); and the Tenth in *Brown v. Uphoff*, 381 F.3d 1219 (2004), agreed with the Seventh. But the Ninth Circuit in *Bockting v. Bayer*, 399 F.3d 1010 (2005), held that *Crawford* should apply retroactively. In the case at bar, the *ex parte* evidence was "testimonial" as defined by *Crawford*, 124 S. Ct. at 1374. The prosecution introduced over objection the grand-jury testimony of Cueto's co-defendant, Robert Romanik, who had pleaded guilty before trial. The prosecution also admitted over objection two tape recordings made by Bonds Robinson; tape recordings which were used by the Government at trial as Robinson's testimony. The Government refused to call Romanik or Robinson, and barred Cueto from calling them. The Government had Romanik agree as part of his plea-deal, to plead the Fifth when called by Cueto; and the Government moved Judge Limbaugh to bar Cueto from calling Robinson, a motion the judge granted. This is Point 1.

With respect to Point 2, your Petitioner's research can find no case by this Court since the enactment of the AEDPA, in which the holding explains habeas corpus jurisdiction for a federal prisoner under 28 U.S.C. § 2241. Since the AEDPA, the savings clause of 2255 which opens the door to 2241 for federal prisoners, "has become the focus of intense debate", and has been the subject of dozens of cases in the federal courts. *See* Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the AEDPA of 1996*, 30 AM.J. Crim L., 171, 190 (2003).

The habeas issue presented in Question 2, provides the appropriate case for this Court to settle the "intense debate" in the circuit courts of appeal. There is no question about the fact that Amiel Cueto is actually innocent, because the intervening change of law *Andersen v. U.S.*, __ U.S. __, 125 S. Ct. 2129 (2005), has rendered Cueto's crime non-existent. The jury in Cueto's case was instructed that Cueto should be convicted, even though all of his acts had been lawful, if he'd committed the lawful acts with a "corrupt motive." *Andersen* involved obstruction of justice under 18 U.S.C. § 1512, the mirror of 1503 with respect to the issue at bar. *Andersen* equates "lawful" with "innocent", and holds that people who commit lawful acts commit no crime. There is also no question that 2255 is inadequate to test the legality of Cueto's detention, because of the restrictions in the AEDPA.

There is a second intervening change of law which renders Cueto's crime non-existent. *Virginia v. Black*, 538 U.S. 343 (2003). Cueto was charged in Paragraph 43 of the Indictment with committing a criminal "intimidation", for having published the editorial in the East Side Review: "LOCAL JUSTICE DEPARTMENT NAZIS WHO ALSO

MAY BE PROSECUTED BY STATE AUTHORITIES"[3]. This "intimidation" was alleged as "part of the conspiracy", and the proof of "corrupt motive" that converted Cueto's lawful acts into obstruction of justice. Ms. Miquelon had Judge Limbaugh remove her name from the version of the editorial that was submitted to the jury. This redacted version was admitted into evidence, over objection, as Government Exhibit 28-2A. (App. O) Miquelon was allowed to argue that the name in the blank spaces where her name had been removed, was that of Bonds Robinson. The "intimidation" was Cueto's statement in the editorial that he was "known to dislike Nazis", and that Nazis should not "escape prosecution". *Black* intervenes because, for the first time, "intimidation" is defined by this Court. "Intimidation in the constitutionally proscribable sense of the word" is "where a speaker directs a threat to a person . . . with the intent of placing the victim in fear of bodily harm or death." 538 U.S. at 360. Cueto never communicated the editorial to the alleged "victim", Bonds Robinson; and Robinson never saw the editorial. Nor did the editorial threaten anyone with "bodily harm or death." Thus *Black* intervenes to render Cueto's publication of the editorial a non-existent crime in all of the four counts for which he was convicted.

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3. Paragraph 43 of the Indictment charged as follows:

> 43. It was further a part of the conspiracy that in January 1995 CUETO caused to be published through the Century Printing Company, a newspaper tabloid known as the East Side Review which he then caused to be mailed to approximately 48,000 households in the metro east St. Louis area. CUETO would and did *threaten by intimidation* in the East Side Review that he would prosecute Robinson if CUETO won election for State's Attorney.

Italics added.

I. THE CONFLICT BETWEEN THE CIRCUITS SHOULD BE RESOLVED, SO THAT THE RULE OF *CRAWFORD V. WASHINGTON* IS HELD TO BE RETROACTIVE TO CASES ON COLLATERAL REVIEW.

At Cueto's trial, the Government introduced over objection the *ex parte* testimony of two individuals who did not testify live at trial. The Government could have called either one to the witness stand, but chose not to. The defense was then barred from calling them. Robert Romanik had been Cueto's investigator and was charged as Cueto's co-defendant. Romanik pleaded guilty before Cueto's trial; and the Government had him agree in his plea-deal that Romanik would plead the Fifth when Cueto called him as a defense witness.

Romanik's grand-jury testimony was then admitted over objection. There is no doubt that Romanik's grand-jury testimony was prejudicial, in fact it was essential to convict Cueto. Ms. Miquelon argued strenuously for its admission across thirteen pages of transcript (Vol. 12, pp. 206-19); and Judge Limbaugh acknowledged that Romanik's grand-jury testimony had to be admitted "for the purpose of establishing certain elements of the Government's case-in-chief". (*Id.* at p.211) Ms. Miquelon emphasized in closing argument that Romanik's grand-jury testimony contradicted Cueto's live testimony. (*See, e.g.*, Vol. 31, p.23.) The Judge admitted the grand-jury testimony, even though he acknowledged that "it is obvious that there has been no right of confrontation, and will be none" (Vol. 12, p.211).

Bonds Robinson was also an essential witness for the prosecution. Three of the four Counts Cueto was convicted of, alleged criminal conduct by Cueto against Robinson.

Cueto was convicted of Count 1, Conspiracy, which charged in Paragraph 43 that Cueto's editorial in the East Side Review (App. P) had been an "intimidation" against Robinson. Cueto was convicted of Count 2, obstructing justice in the U.S. District Court for the Southern District of Illinois in "*Venezia v. Robinson*, cause no 92-CV-867" (Par.64), by Cueto's having filed a Petition for Writ of Certiorari *in this Court* on May 31, 1994, under this Court's number 93-1929. (*See* App. E which is Government Exhibit 85-12, the heavily-redacted version of Cueto's Petition in this Court which was admitted into evidence, over objection, against Cueto to prove Count 2.) Cueto was convicted of Count 6, obstructing justice in a grand-jury investigation and prior criminal case against Venezia, "by Cueto engaging in acts to persuade the St. Clair County State's Attorney to indict Agent Robinson" (Par.73). These "acts to persuade" were two letters Cueto wrote to Haida in January and June 1994. (*See* Gov. Exhibits 28-12 and 28-13, App. F and N.)

Cueto was also convicted of Count 7, obstructing justice in the prior criminal case against Venezia "by preparing and filing and causing to be prepared and filed false pleadings and court papers" (Par.75). No one knows whether this Count had anything to do with Robinson, because it has always been undisputed that no one knows the identity of the "false pleadings and court papers" Count 7 refers to. No judge or prosecutor has ever been able to identify those documents. No Count 7 "false pleadings and court papers" were identified at trial. It is true that in closing argument, Miquelon referred to GX 82-1 as the Count 7 documents, but GX 82-1 does not exist.

Returning to Bonds Robinson, the Indictment referred to him directly by name in Paragraphs 23, 26a, 26b, 26c,

26d, 26e, 26f, 27, 28, 29, 30, 31, 33, 33a, 33b, 33d, 39, 40, 41, 42, 43, 62a, 62d, 62e, 62f, 62g, 62m, 64 and 73. So there is no question that Bonds Robinson was an essential witness for Cueto's conviction. But the Government did not want to call him live, because any cross-examination at all would have revealed that Robinson was a career extortionist, who had been trying to extort bribes from Venezia before and during Robinson's having acted as an informer for the FBI against Venezia[4]. The Government also made sure that the defense could not call Robinson, see: "GOVERNMENT'S MOTION TO BAR TESTIMONY OF BONDS ROBINSON" (App. K).

Over objection, the Government had Judge Limbaugh admit two tapes made by Robinson. Ms. Miquelon argued to the jury that through the tapes, Robinson had been a trial witness: "We brought you Bonds Robinson too." (Vol.31,

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4. Cueto had dozens of witnesses who had been the victims of Robinson's extortion, and Cueto planned to call them all. Each one would have proved Cueto's innocence. Before trial, Cueto's counsel had had an investigator tape and transcribe the interviews with three of these victim-witnesses: Donald Dulle, Barney Miller, and Robert Karras. The interview-transcripts are attached here at Appendix G, I, and J respectively. Before the defense began its case-in-chief, Ms. Miquelon had Judge Limbaugh order the defense to turn over any statements of witnesses. Cueto obeyed and disclosed the transcribed interviews of Dulle, Miller and Karras. Ms. Miquelon realized that the testimony of either Dulle or Miller or Karras or any of the dozens of other victims of Robinson, would prove that Robinson was a career extortionist, and thus disprove the allegations in the Indictment. Ms. Miquelon had Judge Limbaugh bar these three witnesses (and by extension, all other victim-witnesses of Robinson's extortion racket). *See* Judge Limbaugh's Order, App. H. This took away Cueto's entire defense, and in effect, barred him from calling any witnesses, except himself.

p.228) Ms. Miquelon hammered the Robinson taped-recorded testimony: "And ladies and gentlemen, you heard the August 17th tape. And on that tape is the voice of Bonds Robinson." (Vol.31, p.40) She continued on page 41: "Then you heard the second tape . . . (of) Bonds Robinson, and just like the first tape, ladies and gentlemen, *that tape was a stinger.*" (Italics added.) Without the tape-recorded "sting(ing)" testimony of Bonds Robinson, who was obviously the central character in the prosecution's case, Cueto would have been acquitted.

There is no doubt that if *Crawford* would have been decided while Cueto's case had been on direct appeal, he would have received a new trial. The question therefore, is whether the rule of *Crawford* is retroactive under *Teague v. Lane*, 489 U.S. 288 (1989).

There is no dispute about the fact that *Crawford* is a new rule of criminal procedure. The Confrontation Clause is a "bedrock procedural guarantee" (*Crawford* 124 S. Ct. at 1359); and *Crawford* (*Id.* at 1369) overruled *Ohio v. Roberts*, 448 U.S. 56 (1980). This new rule of *Crawford* eliminates judicial determinations as to the reliability of testimonial-evidence; and "commands" that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 124 S. Ct. at 1370.

Generally, new rules of criminal procedure are not retroactive. *Teague* held that there are two exceptions to the general rule, and based its analysis on the opinions of Justice Harlan in *Mackey v. U.S.* 401 U.S. 667 (1971), and other cases. "Justice Harlan identified only two exceptions to his general rule of non-retroactivity for cases on collateral review." *Teague*, 489 U.S. at 307. The second exception

applies at bar, *see Teague* (id): "Second, a new rule should be applied retroactively if it requires the observance of 'those procedures that are implicit in the concept of ordered liberty.'" [Ellipses and some internal quotation marks are omitted. The internal quote cites to Justice Harlan's opinion in *Mackey*, which quotes *Palko v. Connecticut*, 302 U.S. 319 (1937).]

Therefore if a new rule of criminal procedure is "implicit in concept of ordered liberty", as that term was construed in *Palko*, it is retroactive under *Teague*. There can be no doubt that the right of confrontation recognized in *Crawford* is just such a rule, because Justice Harlan told us so in his concurring opinion in *Pointer v. Texas*, 380 U.S. 400, 408 (1965): "For me, this state judgment must be reversed because a right of confrontation is 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*".

Teague also explained (489 U.S. at 311) that the "language used by Justice Harlan in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure". *Teague* (id) then quoted Justice Harlan in *Mackey*, as defining a "watershed rule" as one which implicates "*bedrock procedural elements*". (Italics in the *Teague* opinion.) This is the exact same language used by this Court in *Crawford* (124 S. Ct. at 1359) to describe the Confrontation Clause: "We have held that this (is a) bedrock procedural guarantee". *See also* the Ninth Circuit's analysis as to why *Crawford* is a watershed rule. *Bockting*, 399 F.3d at 1017-21.

Teague was decided in 1989, but your Petitioner respectfully submits that it is significant that in two pre-*Teague* cases, this Court twice held that new rules under the

Confrontation Clause merited retroactive application. *See Roberts v. Russell*, 392 U.S. 293 (1968); and *Bruton v. U.S.*, 391 U.S. 123 (1968).

To sum up: Justice Harlan, who was the original author of the retroactivity doctrine that became the law in *Teague v. Lane*, has said expressly that the right to confrontation is implicit in the concept of ordered liberty. Justice Harlan has also described a watershed rule as one which is a "bedrock procedural" guarantee, the exact same words used by this Court to describe the new rule in *Crawford*. In two pre-*Teague* cases, this Court has retroactively applied new rules under the Confrontation Clause. Your Petitioner respectfully prays that the Court will grant Certiorari to resolve the conflict between the Circuits, and ultimately decide that *Crawford* is retroactive to cases on collateral review.

II. THERE IS JURISDICTION UNDER 28 U.S.C. § 2241 FOR AMIEL CUETO'S HABEAS CORPUS CLAIM, BECAUSE THERE IS NO DOUBT ABOUT THE FACT THAT CUETO IS ACTUALLY INNOCENT, AND THAT 28 U.S.C. § 2255 IS INADEQUATE OR INEFFECTIVE TO TEST THE LEGALITY OF HIS DETENTION.

The jury at Cueto's trial was instructed as follows, and the Seventh Circuit approved the instruction. *U.S. v. Cueto*, 151 F.3d 620, 630-31 (1998).

> Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have

> reasonably seen that the natural and *probable*[5] consequences of his acts was (sic) the obstruction of justice. Intent may be inferred from all the surrounding facts and circumstances. *Any act*, by any party, *whether lawful* or unlawful on its face, may violate Section 1503, if performed with corrupt motive.

Italics added.

Under the *Stromberg* test, it must be conclusively presumed as a matter of the constitutional law of due process[6], that the jury found Cueto guilty even though all of his acts had been lawful. *Stromberg v. California*, 283 U.S. 359 (1931). *See also Street v. New York*, 394 U.S. 576 (1969). When Cueto filed this habeas application on July 19, 2002, he re-raised the claim that he had been convicted of a non-existent crime. In 2003, Cueto filed a memorandum citing *State Farm v. Campbell*, 538 U.S. 408, 421 (2003), for the proposition that he'd been convicted of the non-existent crime of committing lawful conduct: "A State cannot punish a defendant for conduct that may have been lawful where it occurred." In *State Farm*, the "defendant" had been "punish(ed)" in tort. But Cueto in his 2003 memorandum, argued that if a tort-defendant could not be punished for

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5. Besides other defects, this instruction allowed Cueto to be convicted without specific intent; and the Government's burden of proof was reduced to a "probable" standard, as opposed to proof beyond a reasonable doubt.

6. *Stromberg* construed the Due Process Clause of the 14th Amendment, applicable to the states. The Fifth Amendment Due Process Clause applies to this federal case at bar, but of course the analysis is the same.

lawful conduct, certainly a criminal defendant could not be punished if all his acts had been lawful.

Under the *Stromberg* test, it must be conclusively presumed as a matter of constitutional law that the act in furtherance that was the "part of conspiracy" charged in Count 1 (Par. 43 of the Indictment) – that is, the act that completed the conspiracy – was Cueto's publication of the editorial in the East Side Review (App. P). The lawful acts performed by Cueto which obstructed justice were: Count 2, filing a petition for Writ of Certiorari *in this Court* on May 31, 1994 in *Venezia v. Robinson* (*see* App. E, which is the heavily redacted version introduced over objection to prove the act in Count 2); Count 6, writing two letters to State's Attorney Haida in January and June of 1994 (*see* App. F and App. N); and Count 7, preparing and filing "false pleadings and court papers" which no one has ever been able to identify.[7]

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7. On direct appeal, Cueto claimed that he had been convicted of Count 7 despite the fact that no one could identify the crime. Cueto also claimed that none of the acts he'd committed in Counts 2 and 6 could violate 1503, because none of the judicial proceedings he was alleged to have obstructed, were pending when he'd performed the alleged obstructive acts. In Count 2, Cueto was charged with obstructing a proceeding in the U.S. district court that had been dismissed on May 18, 1993 (*see* App.L, which is GX 85-9), by Cueto's filing of a Petition *in this Court* on May 31, 1994 (App. E), more than a year after the proceeding in the district court had ceased to be pending. In Count 6, Cueto's letters of January and June 1994, allegedly obstructed the 1994-1 grand jury, which was not impaneled until August 1994; and also allegedly obstructed a criminal case against Venezia, which was not indicted until March 1995. Cueto's counsel also told the Seventh Circuit during oral argument on May

(Cont'd)

On May 31, 2005, this Court delivered its opinion in *Arthur Andersen LLP v. U.S.*, 125 S. Ct. 2129. Two days later, on June 2, Cueto filed a pleading in this habeas case in district court, alleging that *Andersen* was an intervening change of law which rendered Cueto's conviction void, as being for a non-existent crime. The intervening-change-of-law doctrine is found in *Davis v. U.S.*, 417 U.S. 333 (1974); and *Bousley v. U.S.*, 523 U.S. 614 (1998). In the former case, Joseph Davis had been convicted of violating the Selective Service Act, after which he appealed to the Ninth Circuit. While Davis' appeal was pending, this Court decided *Gutknecht v. U.S.*, 396 U.S. 295(1970). Gutknecht had also been convicted of violating the same provision of the Selective Service Act as Davis. But this Court held that although Gutknecht may have violated an administrative regulation, he had not violated any statute enacted by Congress, and so therefore he had been convicted of a non-existent crime.

(Cont'd)

11, 1998, that Cueto was claiming that he'd been convicted in violation of the rule of *U.S. v. Aguilar*, 515 U.S. 593 (1995), which required a "nexus" between obstructive acts and judicial proceedings. Counsel emphasized to the panel that Cueto was *not claiming insufficiency of the evidence.* (*See* App. M, which is an excerpt of the oral-argument transcript.) However, when the Seventh Circuit decided Cueto's direct appeal, the Court did not address Cueto's argument that the crime in Count 7 could not be identified; nor did the Court address Cueto's argument that it was a non-existent crime to obstruct non-existent proceedings. And despite Cueto's lawyer's explicit statement at oral argument, the Court reported that Cueto's direct appeal was contending "that the government presented insufficient evidence". 151 F.3d at 634. On the basis of "insufficient evidence", an argument Cueto had expressly disclaimed, his conviction was affirmed.

Davis' direct appeal was denied, and his 2255 Motion was denied in the district court. The Ninth Circuit affirmed the denial of the 2255, notwithstanding *Gutknecht*, on the ground that "the decision in the direct appeal is the law of the case"; and therefore "any new law, or change in law" resulting from a Supreme Court decision was not applicable. [*See U.S. v. Davis*, 472 F.2d 596 (9th Cir. 1972).]

This Court reversed, holding that Davis' collateral attack was permissible "by reason of an intervening change of law". *Davis*, 417 U.S. at 342. Davis had been convicted "for an act that the law does not make criminal". *Id.* at 346. The Court held there "can be no room for doubt" that the "circumstances" of Davis' case "*justify collateral relief*", 417 U.S. at 342. (Italics added.)

Bousley followed *Davis*. Kenneth Bousley had pleaded guilty to a violation of 18 U.S.C. § 924(c), "using" a firearm in connection with drug a offense. He filed a direct appeal attacking his sentence, which was denied. Bousley thereafter sought habeas relief, which was denied. Bousley appealed, and while the appeal was pending – five years after Bousley had pleaded guilty – this Court decided *Bailey v. U.S.*, 516 U.S. 137 (1995). *Bailey* held that mere possession of a firearm was not "use"; that mere possession did not violate 924(c); and therefore that Bailey had been convicted of a non-existent crime.

This Court applied *Bailey* to Bousley's case to avoid the "significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620. (Internal quote cites *Davis*.) *Bousley* then stated the

jurisdictional principle that goes to the heart of the matter at bar (523 U.S. at 621):

> Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* to support his claim.

Gutknecht is to *Davis*, as *Bailey* is to *Bousley*, as *Andersen* is to *Cueto*. In other words: Just as Davis was allowed jurisdiction to obtain collateral relief because *Gutknecht* had rendered his crime non-existent; and just as Bousley was allowed jurisdiction to obtain collateral relief because *Bailey* had rendered his crime non-existent; so too can Cueto claim jurisdiction to obtain collateral relief because *Andersen* has rendered his crime non-existent.

Andersen involved obstruction of justice under 18 U.S.C. § 1512, which is the mirror of 1503 with respect to the issue at bar. [*See* the discussion of *Aguilar*, 125 S. Ct. at 2137. *See also U.S. v. Andersen*, 374 F.3d 281, 296 (5th Cir. 2004).] In *Andersen*, the jury was told that, "even if (petitioner) honestly and sincerely believed that its conduct was lawful, you may find (petitioner) guilty." 125 S. Ct. at 2136. Chief Justice Rehnquist, writing for a unanimous Court, held that "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." Chief Justice Rehnquist found it "striking how little culpability the instructions required." (*Id.*) If the *Andersen* instruction was striking, the *Cueto* instruction can be nothing less than shocking. In *Andersen*, the accused had honestly and sincerely believed that its "conduct was lawful". In Cueto's case, *all of his conduct was in fact lawful*, by definition in the jury-instruction.

Andersen also found reversible error in the instruction on the term "corruptly". 125 S. Ct. at 2136. The instruction did not require "dishonesty", only a "specific intent" to "impede"; which the Court said "did no limiting work whatsoever." (*Id.*) In the case at bar, not even "specific intent" was required. Cueto's instruction allowed conviction on the mental state that he "should have reasonably seen that the natural and probable consequences of his (lawful) acts" could lead to obstruction of justice, which is a negligence-in-tort state of mind.

Chief Justice Rehnquist uses "lawful" as a synonym for "innocent"[8], and condemns the *Andersen* instruction because it "diluted the meaning of 'corruptly' so that it covered innocent conduct." 125 S. Ct. at 2136. In the case at bar, the instruction was far worse than that which was condemned in *Andersen*. The jury was instructed that Cueto's conduct was both "corrupt" and "lawful" at the same time, if he'd acted "with the purpose of obstructing justice", which Cueto had accomplished by the performance of lawful acts.

Under the *Stromberg* test, Cueto was convicted despite the fact that all of his conduct was lawful and innocent. This Court has said repeatedly that, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed". *U.S. v. Aguilar*, 515 U.S. at 600, citing *McBoyle v. U.S.*, 283 U.S. 25, 27 (1931). Your Petitioner respectfully submits that he could have had no way of knowing that he had passed a "certain" line, when – as a newspaper publisher

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8. *See also The New Shorter Oxford English Dictionary*, in which one of the definitions of "innocent" is: "That (which) does not break the law; lawful, permitted."

– he published the three-paragraph editorial in the East Side Review. (*See* App. P.) Nor could he have known that as a lawyer representing a client by filing a Petition for Writ of Certiorari in this Court (*see* App. E), that he had "passed" the criminal line into obstruction of justice. And Cueto could never have known that by petitioning the government-officer Haida[9] on behalf of a client (*see* App. F and N), that he'd obstructed federal judicial proceedings.

Andersen intervenes to leave no doubt about the fact that Cueto is actually innocent, and that he is entitled to habeas corpus under the rule of *Davis* and *Bousley*. Both *Davis* and *Bousley* obtained their relief under 28 U.S.C. § 2255. Cueto had filed and lost his 2255 Motion before *Anderson* was decided (and also before *State Farm v. Campbell* was decided). The AEDPA allows a second 2255 in only two narrow circumstances: "newly discovered evidence" or a "new rule of constitutional law". *Andersen* comes under neither category; it construes a criminal statute, but construes it so that it renders Cueto's detention illegal, because he was convicted of lawful acts that the law does not make criminal. Cueto's collateral relief is cognizable under 28 U.S.C. § 2241, through the savings clause of 2255, because the restrictions in the AEDPA prohibit him from a second 2255 Motion, even though he is actually innocent. Cueto made all these arguments to the district court in the habeas case at bar on June 2, 2005, two days after *Andersen* was decided. When the district court denied Cueto's Application on grounds of jurisdiction more than six months later (December 15, 2005,

9. On direct appeal, Cueto raised the First Amendment right "to Petition the Government for a redress of grievances"; however the Seventh Circuit ignored that argument, and chose to convert Cueto's claim into one involving the different First Amendment issue of freedom of speech. *See Cueto*, 151 F.3d at 634, n.11.

see App. B), the Court never mentioned *Andersen* anywhere in its Order. Cueto raised the same argument in his memorandum on jurisdiction in the Seventh Circuit, but the Court never mentioned *Andersen* in its Order finding no 2241 jurisdiction. (*See* App. A.)

There is a second intervening change of law which renders Cueto's crime non-existent: *Virginia v. Black*, 538 U.S. 343 (2003). Cueto was charged in Paragraph 43 of the Indictment with committing a criminal "intimidation", for having published the editorial in the East Side Review: "LOCAL JUSTICE DEPARTMENT NAZIS WHO ALSO MAY BE PROSECUTED BY STATE AUTHORITIES". (*See* footnote 1 for the charge in Paragraph 43 of the Indictment.) Under the *Stromberg* test, it must be conclusively presumed as a matter of constitutional law, that the publication of the editorial was the act that completed the conspiracy in Count 1; and that it was the proof of corrupt motive that converted the lawful acts in Counts 2, 6 and 7, into obstruction of justice. Ms. Miquelon had Judge Limbaugh remove her name from the version of the editorial that was submitted to the jury. This redacted version was admitted into evidence, over objection, as Government Exhibit 28-2A. (App. O) Miquelon was allowed to argue that the name in the blank spaces where her name had been removed, was that of Bonds Robinson. The "intimidation" was Cueto's statement in the editorial that he was "known to dislike Nazis", and that Nazis should not "escape prosecution". *Black* intervenes because, for the first time, "intimidation" is defined by this Court. "Intimidation in the constitutionally proscribable sense of the word" is "where a speaker directs a threat to a person . . . with the intent of placing the victim in fear of bodily harm or death." 538 U.S. at 360. Cueto never communicated the editorial to the alleged "victim", Bonds Robinson; and

Robinson never saw the editorial. Nor did the editorial threaten anyone with "bodily harm or death." Thus *Black* intervenes to render Cueto's publication of the editorial a non-existent crime in each of the four counts for which he was convicted.

In the instant habeas case in the district court in 2003, Cueto pleaded these same arguments that *Black* was an intervening change of law, that rendered his conviction void in all four counts as being for a non-existent crime; and that under the law of *Davis, Bousley* and the savings clause of 2255, he should be allowed jurisdiction to seek habeas corpus under 2241. The district court never mentioned *Black* in its Order finding no jurisdiction. (*See* App. B) Cueto raised the same arguments in his memorandum to the Seventh Circuit, but the Court never mentioned *Black* in its Order finding no 2241 jurisdiction. (App. A)

So there is no doubt about two facts: 1) Amiel Cueto is actually innocent; which means his detention is illegal; and 2) 2255 is inadequate to test the legality of his detention because of the restrictions in the AEDPA. Therefore, the fifth paragraph of Section 2255, the so-called savings clause, operates to vest jurisdiction under 2241 "for a writ of habeas corpus".

This question of 2241 jurisdiction through the savings clause of 2255, is "the focus of intense debate" that is roiling in the federal courts all over the country. [*See* Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the AEDPA of 1996*, 30 Am.J Crim. L. 171, 190 (2003).] Your Petitioner prays that the Court will grant Certiorari to settle this intense debate, so that innocent federal prisoners such as Amiel Cueto are allowed jurisdiction to obtain their constitutional right to habeas corpus. (U.S. Const. Article I, Section 9, Clause 2).

CONCLUSION

The right of the accused to confront his accusers is as fundamental as the right to a jury-trial; indeed a proceeding which allows conviction based on unconfronted testimony is not really a "trial", as the Framers of the Sixth Amendment intended. The right of confrontation is a bedrock procedural guarantee that is implicit in the concept of ordered liberty. This is the case to resolve the conflict between the Circuits, and hold that new rule of *Crawford v. Washington* is retroactive to cases on collateral review.

The first individual right that the Framers of the Constitution provided for, is found in Article I, Section 9, Clause 2: the Great Writ of Habeas Corpus. Federal prisoners like Amiel Cueto, who are actually innocent but who are barred from the 2255 remedy because of the restrictions in the AEDPA, must be allowed to claim their constitutional right to habeas corpus under 28 U.S.C. § 2241; in fact Congress made express provision for innocent federal prisoners to do just that, through the savings clause of 2255.

This issue is the focus of intense debate in federal courts all over the country. This is the case to settle the question, because there is no doubt about Amiel Cueto's actual innocence, nor is there any doubt that 2255 is ineffective to test the legality of his detention.

Your Petitioner prays that the Court will issue its Writ of Certiorari on both of the questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A — MARCH 10, 2006 ORDER OF THE SEVENTH CIRCUIT; AFFIRMING THE DISMISSAL OF THE CASE AT BAR FOR LACK OF JURISDICTION

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted February 24, 2006
Decided March 10, 2006

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-1099

AMIEL CUETO,

Petitioner-Appellant,

v.

E. A. STEPP,

Respondent-Appellee.

Appendix A

Appeal from the United States District Court for the Southern District of Illinois

No. 3:02-CV-00777

John Daniel Tinder, Judge.

ORDER

Amiel Cueto was convicted of one count of conspiracy to defraud the United States and three counts of obstruction of justice and was sentenced to 87 months' imprisonment. We affirmed his conviction and sentence. *See United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998). Cueto then filed an unsuccessful motion to vacate his sentence under 28 U.S.C. § 2255. He next filed two petitions, purportedly under 28 U.S.C. § 2241, that the district court consolidated and ultimately dismissed for lack of jurisdiction. The district court concluded that the caption of the petition was not controlling and that Cueto's filings amounted to an unauthorized successive collateral attack. In a detailed, 38-page decision, the district court analyzed each of Cueto's 11 claims and concluded that § 2255 was not an inadequate or ineffective means of challenging the legality of his detention.

The district court correctly dismissed the petition for lack of jurisdiction. Cueto's arguments all belong in a § 2255 motion. A second collateral attack requires authorization, *see Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996), and Cueto cannot avoid *Nunez by* calling his second collateral attack a § 2241 motion instead, *see Thurman v. Gramley*, 97 F.3d 185 (7th Cir. *1996)*. Accordingly, *the* judgment of the district court is AFFIRMED.

APPENDIX B — DECEMBER 15, 2005 ORDER AND ENTRY DISMISSING CUETO'S APPLICATION FOR WRIT OF HABEAS CORPUS AND ORDER UNDER 28 U.S.C. § 2241, ON THE GROUND OF LACK OF JURISDICTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICTOF ILLINOIS

No. 3:02-CV-00777-JDT

AMIEL CUETO,

Petitioner,

v.

E.A. STEPP, Warden,

Respondent.

ENTRY DISCUSSING PETITION FOR WRIT OF HABEAS CORPUS[1]

For the reasons explained in this Entry, the petition of Amiel Cueto ("Cueto") for a writ of habeas corpus is **denied and this action is dismissed for lack of jurisdiction**.

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1. This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

Appendix B

I. Background

After a jury trial, Cueto was convicted in this court of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and three counts of obstruction of justice, in violation of the omnibus clause of 18 U.S.C. § 1503. Cueto's convictions and sentences were affirmed on appeal in *United States v. Cueto*, 151 F.3d 620 (7th Cir.1998), *cert. denied*, 536 U.S. 1016 (1999). In that appeal, Cueto argued that: (1) the conviction for conspiracy to defraud was invalid because of constitutional infirmities and because of insufficiency of the evidence; (2) the convictions for obstruction of justice were also invalid because of constitutional infirmities and insufficiency of the evidence; (3) he was entitled to a new trial because the district court erroneously excluded certain defense evidence; and (4) his sentence should be vacated and remanded because the trial court erroneously calculated his sentence. *Id.* at 624.

Following the conclusion of his direct appeal, Cueto filed an action for collateral relief pursuant to 28 U.S.C. § 2255. In that motion, he raised six separate grounds for relief:

- The government's failure to produce a letter from the U.S. Attorney to the Administrator of the Illinois Attorney Registration and Disciplinary Commission constituted a *Brady* violation and compelled the defendant to bear witness against himself in violation of the Fifth Amendment of the United States Constitution.

- The introduction of testimony which the government knew was perjured could have affected the judgment of the jury and on this basis alone, a new trial is required.

- Previously disclosed evidence reveals that the trial judge was biased or that there was an appearance of Rule 11 impropriety requiring a new trial.

- An intervening change of law rendered co-defendant Albert Romanik's grand jury testimony inadmissible, requiring a new trial for Cueto.

- The sentence should be vacated in that 87 months imprisonment and an $80,000 fine are in excess of the maximum allowed by law, and the trial court did not have jurisdiction to impose an excessive sentence.

- Cueto had a good faith belief that other *Brady* violations occurred, which could be brought to the trial court's attention through discovery or an evidentiary hearing.

This motion was denied by the trial court in an unpublished order, *United States v. Cueto*, No. 99-831-SNL (S.D.Ill. Aug. 18, 2000), and both the trial court and the Court of Appeals declined to issue a certificate of appealability.

Cueto now seeks habeas corpus relief pursuant to 28 U.S.C. § 2241(c)(3). The United States, through Cueto's past custodian, has opposed the habeas filing, and Cueto has replied.

Appendix B

II. Habeas Claims

Cueto asserts eleven individual points as reasons that his convictions should be vacated. The points are interrelated as will be noted. The central premise to virtually all of Cueto's arguments is his view of the structure of the charges of convictions and the nature of the evidence upon which he was convicted. Simply put, he contends that he was convicted for publishing a newspaper and for doing other lawful acts.

Point One: Cueto contends that all the matters underlying his convictions relate to his publication of a newspaper entitled *"The Eastside Review."* He contends that it is the publication of the newspaper which is the overt act alleged to complete the conspiracy, and which is also the corrupt motive underlying the obstruction counts of which he was convicted. He asserts that his activities related to the publication of the newspaper were protected under the First Amendment. He further contends that the decision by the Ninth Circuit Court of Appeals in *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir.2002) created a new rule of law that excludes from First Amendment protection only statements or threats which are done with malice and specific intent in communicating true threats to kill, assault, or do bodily harm to individuals.

Point Two: Cueto contends that he could not be convicted of obstruction of justice because his actions which are alleged to be "corrupt endeavors" occurred when there were no judicial proceedings in existence for him to have obstructed. He also contends that it was impossible to

conspire or agree to obstruct judicial proceedings that were not in existence. As a final attack on Count 2, Cueto asserts that the last act which could have been part of the conduct underlying that conviction was the filing of his brief in the Supreme Court on May 31, 1994. The maximum penalty for a violation of 18 U.S.C. § 1503 was 60 months imprisonment and a $5,000 fine, yet his sentence on that count exceeded those limits both as to incarceration and fine. He repeats this assertion as to Counts 6 and 7, and as to the fine of $20,000 on Count 1.

As to Count 6, Cueto contends that the acts associated with Count 6 occurred before the 1994-1 grand jury was empaneled and argues that there is an evidentiary insufficiency relating to Count 6. Count 7 is challenged by Cueto by contending that no false pleadings or papers filed in the racketeering prosecution were identified and linked to him. He contends that, at best, Count 7 could be based on a motion to recuse that was to be filed by attorney Alessi on behalf of defendant Erin Griffin in the racketeering prosecution, yet, technically, even that motion was not filed because it was returned unfiled to counsel. He also argues that if he cannot be convicted of the substantive offenses of Counts 2, 6 and 7, he cannot be convicted of conspiracy to obstruct the proceedings referred to in those counts.

Point Three: Cueto contends that the prosecutor assigned to his case should have been disqualified because of her involvement in other litigation, that the prosecutor acted in an irregular manner when the charges against Cueto were filed, and that these circumstances spilled over into evidentiary rulings made during the trial.

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Point Four: Cueto contends that he was denied his right to self-representation.

Point Five: Cueto contends that Judge Stephen Limbaugh unduly restricted Cueto's testimony on direct examination and that he was denied the right to testify. He also contends that error was committed when his counsel were compelled to disclose that he was going to testify.

Point Six: Cueto contends that his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was denied.

Point Seven: Cueto contends that his right to confront witnesses was denied because a grand jury transcript of Albert Romanik's testimony was admitted into evidence over his objection. Romanik did not testify at trial. Cueto also claims that the prosecutor engaged in misconduct by stating to the jury that Romanik's guilty plea was vicariously applicable to Cueto.

Point Eight: Cueto contends that he was denied the right to confront witnesses with respect to Thomas Venezia.

Point Nine: Cueto contends that he was denied the right to a trial. In essence, this is the aggregate of the preceding errors he asserts, especially Points 2, 4, 5, 6, 7 and 8. Cueto argues that the combination of all of those errors resulted in his not actually having a trial.

Point Ten: Cueto contends that he was denied a fair trial because Judge Limbaugh was prejudiced against him.

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Point Eleven: This point was raised in Cueto's filing on November 24, 2003, in an Addendum to his Memorandum in Support of the Count One Application for Writ of Habeas Corpus. In this point, Cueto argues that the Indictment which was the subject matter of the trial was not the indictment that was returned by the Grand Jury.

Non-claims: At the conclusion of his memo in support of his Amended Application for Writ of Habeas Corpus (pages 178-179), Cueto indicates that many other errors could have been raised through a habeas corpus proceeding, as he says, and "to argue them all would fill a tome longer than *War and Peace*."

III. Preliminary Matters, Post-Hearing Motions, and Further Findings

A. Forensic Testing and Additional Discovery

At the close of the evidentiary hearing and argument conducted on April 30, 2004, Cueto requested leave to have an audio tape and the recording equipment subjected to forensic testing. The requested testing is for the purpose of supporting Cueto's position that either he was not named in the indictment returned on July 18, 1996, or that the indictment returned on that date was a different indictment than that unsealed on August 9, 2005, all in *United States of America v. Amiel Cueto, et al.*, Court No. 96-30070-SNL.

The court finds from the trial court's records and from the evidence at the hearing of April 16, 2004, however, that Cueto was charged in the indictment contained in the court's

records. That indictment was returned on July 18, 1996. It was unsealed on August 9, 2005. Further explanation of the circumstances under which this indictment was returned, and the manner in which it was processed by the Clerk's Office, is set forth in Part III.C. of this Entry. The court's finding on this point makes the requested forensic testing an exercise in futility and a waste of time and other resources. Because an indictment carries a "presumption of regularity," *United States v. R. Enters., Inc.*, 498 U.S. 292, 300-01, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991), based on the present state of the record, the court concludes that in this case the indictment was properly returned and it will not indulge Cueto in what can only be described as a fishing expedition. The request for forensic testing of the cassette tape and recording equipment is **denied**. The same conclusion is reached, and the same ruling is made, with respect to the possible depositions of persons not called as witnesses on April 30, 2004.

B. Post-Hearing Disclosure by United States and Motions

As the parties recognize, and as a refrain which must be repeated throughout this decision, the court's first task in this case is not to fix errors, nor to revisit points at which challenged decisions were made, nor to opine on whether it would have ruled differently, but to first of all determine whether the habeas court has the authority to make such inquiries given the circumstances of the case. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 440 (7th Cir.1992) ("judges must consider jurisdiction as the first order of business."). Not even by agreement could the parties

enlarge the court's jurisdiction — and, of course, the United States has consistently argued that jurisdiction is absent.

Following the proceeding on April 30, 2004, the United States filed certain material under seal. This material consisted of a transcript of the grand jury testimony of Congressman Jerry Costello given on April 15, 1996. One subject of that testimony was Congressman Costello's meeting with St. Clair County State's Attorney Robert Haida. The United States now concedes that the grand jury testimony of Congressman Costello could be read as partially contradicting the testimony given by Haida at Cueto's trial. The United States submitted this material with the view that this transcript "should have been disclosed to the defense under the general principles of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.[2]

The transcript of Congressman Costello's April 15, 1996, testimony before the grand jury need not be disclosed at this point. Apart from its content and potential use to Cueto, one prong of a so-called *Brady* violation is that the evidence was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *United States v. Aldaco*, 201 F.3d 979, 982-83 (7th Cir.2000).

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2. Current counsel for the United States is uncertain whether the transcript or even the substance of the testimony was disclosed in connection with the trial.

In this instance, Cueto knew about Congressman Costello's testimony before the grand jury and could have elicited information concerning that testimony, and hence the basis for contradicting any part of Mr. Haida's testimony, by interviewing the Congressman before trial or calling him as a witness at trial. Cueto did neither of these things.[3] Nonetheless, it is clear from assertions made by Cueto prior to, during, and after trial that Cueto knew that Costello's testimony would have been favorable to him. Additionally, Cueto plumbed the depths of Congressman Costello's testimony before the grand jury previously, in the § 2255 motion itself, and any effort to do so again by capitalizing on the United States' in camera filing of September 30, 2004, would come too late. *Taylor v. United States*, 3:04-CV-1865-P, 2004 WL 2479913 (N.D.Tex. Nov.2, 2004) ("Nor does Petitioner's *Brady* claim fall under the savings clause. His *Brady* claim is not (i) based on a retroactively applicable Supreme Court decision which established that the petitioner may have been convicted of a nonexistent offense, and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal or first § 2255 motion.") (citing *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir.2001)). Indeed, Cueto's "point 6" in his § 2255 motion includes explicit reference to the undisclosed grand jury testimony of Congressman Costello. In explaining why he did not call Congressman Costello as a

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3. Perhaps Cueto also could have sought to depose Congressman Costello pursuant to *Federal Rule of Criminal Procedure 15(a)*, citing exceptional circumstances.

witness at trial, Cueto states on pages 59-60 of the Memorandum he filed on June 1, 2000, in No. 99-831-SNL, that:

> The defense was faced with the dilemma of whether the assertions of the Congressman's lawyers — that the grand jury testimony was exculpatory — were correct; or whether the pleadings and assertions of the Government — that Congressman Costello's testimony was inculpatory — were true. The Government had not disclosed the Costello grand-jury transcript as it was bound to do under *Brady v. Maryland*, if the testimony of the Congressman was exculpatory or impeaching. The defense finally decided to take the Government as [sic: at] its word. The defense could not risk calling Congressman Costello if the testimony were in fact inculpatory. . . .
>
> Now however, given the *Brady* violations the accused has discovered since his conviction and appeal, there should be little doubt that the Congressman's grand-jury testimony was indeed exculpatory, and probably impeaching of Government witnesses, including Robert Haida and Phil Montalvo. It seems apparent that the Government suppressed the transcript and falsely pleaded that the Costello testimony was inculpatory, in order to deceive the defense into not calling the Congressman.

Thus, the Congressman's grand jury testimony as a possible basis for impeaching Robert Haida at trial was very much associated with Cueto's § 2255 action. The claim was rejected. He sought production of Congressman Costello's grand jury testimony. That request was denied. Each of these subjects was discussed on pages 27-30 of the August 18, 2000, *Memorandum and Order* in *United States v. Cueto*, No. 99-831-SNL. This is not a proceeding in which relief can be sought or awarded predicated on error in the disposition of the claim in the § 2255 action. Accordingly, the United States' submission of the transcript of Congressman Costello's grand jury testimony could not now be a basis for relief.

Cueto also filed a series of motions following the proceeding on April 30, 2004, attempting to restate and support the merits of his claims with additional authority. No restatement of his claims at this point is warranted, nor does the proposed restatement of his claims alter the nature of the claims. The proposed additional authority relates entirely to the merits of certain of Cueto's claims, but this is not germane because of the conclusion reached in Part V of this Entry relative to the question of jurisdiction. Because that conclusion is that jurisdiction is absent, beefing up arguments regarding the claims themselves is of no value to the parties or to the court. These motions, whether submitted in a direct form or through the veil of "motion for leave to . . ." are each **denied**.

Appendix B

C. Findings of Fact

Familiarity with the indictment filed with the clerk on July 18, 1996, with the Court of Appeals' decision in Cueto's direct appeal, and with Judge Limbaugh's decision in the § 2255 action is assumed. The findings of fact from the prior judicial decisions are incorporated herein by reference, because they are pertinent to the proceeding, because they are fully supported by the expanded record, and because Cueto has not shown that the facts are other than as recited in those decisions. However, in order to make clear the exposition which is required of Cueto's many claims, certain additional findings are made. These findings are based on the pleadings, on the evidentiary and expanded record, and on the court's file in the underlying criminal action, as well as the file in the earlier § 2255 action:

1. Cueto was charged with seven counts in an Indictment returned in this court on July 18, 1996. The other individuals named as defendants in the Indictment were Romanik and Venezia.

2. After various pretrial proceedings, including the assignment of the Honorable Stephen Limbaugh from the Eastern District of Missouri as judge, Cueto's trial commenced on April 7, 1997, and concluded on June 11, 1997. Cueto was convicted of the four offenses already noted, was found not guilty of three other charges, and was sentenced on September 17, 1997.

3. In July 1996, there was an orderly procedure whereby the Clerk's Office would process grand jury returns.

Appendix B

Customarily, one of two United States Magistrate Judges would "take" the return of the grand jury from the United States Attorney. This would occur in open court, with a representative of the Clerk's Office present. The United States Attorney would inform the court of the action of the grand jury, i.e., return a "true bill" or a "no bill." In the case of a "true bill," an indictment was produced. The court would be informed of the particulars of the indictment, meaning who was named as a defendant and what charges had been brought, and also of incidental matters, meaning whether a warrant was requested and/or whether the United States sought to seal the indictment. Deputy Clerk Jill Swift was present during the returns made on July 18, 1996, and prepared courtroom minutes of the proceedings conducted on that date.

4. On July 18, 1996, the Clerk of the Court was Stuart O'Hare. Mr. O'Hare represented the Clerk's Office on that date during a grand jury return made in the late morning before Magistrate Judge Cohn. Among the items as to which a return was made was the issuance of an indictment by the grand jury described in numbered paragraph 1 above.

5. Mr. O'Hare took the indictments which were in the grand jury return made on the morning of July 18, 1996, and delivered them to Margaret Ruth Brooks, who at that time was the Operations Supervisor of the Clerk's Office. Prior to this time, no case number had been assigned to the indictments, nor had the clerk processed the indictments in any other fashion, because prior to the return being made the indictments had been in the possession of the United States Attorney.

6. Upon receiving the indictments from Mr. O'Hare, Ms. Brooks checked them for completeness in terms of paperwork. The paper she expected from each indictment included a grand jury concurrence sheet, which is prepared by the United States Attorney and contains the signatures of the members of the grand jury who had voted to issue the indictment. This concurrence sheet is a voting record of the grand jury and is sometimes referred to as "a ballot."

7. The indictment described in numbered paragraph 4 above (charging Thomas Venezia, Robert Romanik and the Petitioner *only*) was delivered to Ms. Brooks by Mr. O'Hare. The indictment, a multi-page document, was stapled when Ms. Brooks received it. The indictment was accompanied by a motion to seal the indictment. Magistrate Judge Cohn granted that motion in a written Order. The Order sealing the indictment was delivered with the indictment to Ms. Brooks from Mr. O'Hare. Ms. Brooks checked the papers to verify that the indictment had been signed by the grand jury foreperson and the United States Attorney and that the foreperson had also signed the grand jury concurrence. She found those signatures to be affixed to the respective documents, as indeed they were. At this point, the indictment was filed with the clerk. The filing of this indictment occurred at 1:51 p.m. on July 18, 1996. Deputy Clerk Linda Cook assigned the case number 96-30070-WDS. The case designation was subsequently changed to No. 96-30070-SNL upon the assignment of Judge Limbaugh to the case.

8. Typically, a sealed indictment would at this point be placed in a brown envelope. That occurred here, although at some later point the indictment was not found to be in the

brown envelope. This could be explained, and probably occurred here by someone in the Clerk's Office making a copy of the indictment for the United States Attorney and not placing the indictment back into the envelope. The document reflecting concurrence as to this indictment, however, was not where it was expected to be, but was found in December 2003, in an area of the Clerk's Office in which sealed materials were kept. That concurrence shows compliance with Rule 6(f) of the *Federal Rules of Criminal Procedure*.[4]

9. The indictment which was returned on July 18, 1996, and in which Cueto, Romanik and Venezia were named as defendants, was unsealed on August 9, 1996. That is the authentic indictment, meaning the same indictment which contained the charges returned by the grand jury in Magistrate Judge Cohn's courtroom on July 18, 1996.

IV. Applicable Law

Cueto seeks relief pursuant to 28 U.S.C. § 2241(c)(3). Cueto also invokes the writ of habeas corpus as preserved by the United States Constitution, separate from the statutory writ which exists in § 2241.

A writ of habeas corpus may be granted when it is established that the applicant "is in custody in violation of

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4. Rule 6(f) states that: "A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court."

the Constitution or laws or treaties of the United States." *Id.* Ordinarily, an action pursuant to 28 U.S.C. § 2255 is the exclusive means for a federal prisoner to attack his conviction. *Kramer v. Olson*, 47 F .3d 214, 217 (7th Cir.2003); *Garza v. Lappin*, 253 F.3d 918, 921 (7th Cir.2001). However, § 2241 may be utilized by a federal prisoner to challenge the legality of his or her conviction or sentence in those cases where § 2255 is " 'inadequate or ineffective to test the legality of [the] detention." ' *Kramer*, 347 F.3d at 217 (quoting 28 U.S.C. § 2255 ¶ 5). This has been referred to as the "statutory escape hatch," *Longbehn v. United States*, 169 F.3d 1082, 1083 (7th Cir.1999), but is referred to in this Entry as the savings clause. *See Kramer*, 347 F.3d at 217. A remedy pursuant to § 2255 is "inadequate" when its provisions limiting multiple § 2255 motions prevent a prisoner from obtaining review of a legal theory that establishes the petitioner's actual innocence. *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir.2002). This means that "the focus is on procedures rather than outcomes." *Id.* Two elements are necessary to make the required showing:

> [A petitioner] must first show that the legal theory he advances relies on a change in law that both postdates his first § 2255 motion (for failure to raise a claim the first time around does not render § 2255 "inadequate") and "eludes the permission in section 2255 for successive motions." *See In re Davenport*, 147 F.3d 605, 611 (7th Cir.1998). Second, he must establish that his theory supports a non-frivolous claim of actual innocence. *See Taylor*, 314 F.3d at 835 ("Every court that has addressed the matter has held that § 2255 is

> 'inadequate or ineffective' only when a structural problem in § 2255 forecloses even one round of effective collateral review — and then only when as in *Davenport* the claim being foreclosed is one of actual innocence."); *see also Cooper v. United States*, *199 F.3d 898*, *901 (7th Cir.1999)* ("A valid claim of actual innocence would be enforceable under § 2241 . . . if relief under [§ 2255] was not . . . available.").

Kramer, 347 F.3d at 217. It is the prisoner's burden to prove that his remedy under § 2255 is inadequate or ineffective. *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir.2001) (per curiam); *Charles v. Chandler*, 180 F.3d 753, 756 (6th Cir.1999). The methodology for addressing Cueto's claims is straightforward: The nature of his claims as challenging his convictions has already been established. As to each claim, it must be determined whether Cueto has shown that his remedy via § 2255 is inadequate or ineffective. If not, then his petition must be dismissed for lack of jurisdiction, as in *United States v. Lloyd*, 398 F.3d 978 (7th Cir.2005). If so, however, then to that extent his § 2241 claims must be addressed on their merits. *Grey-Bey v. United States*, 209 F.3d 986, 990 (7th Cir.2000) ("[A] district court presented with a petition for writ of habeas corpus under § 2241 should analyze that petition on its own terms, without assuming that whatever cannot proceed under § 2255 also cannot proceed under § 2241[.]").

The savings clause of § 2255 ¶ 5 is to be applied in light of the intent of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") to replace the world of *Sanders*

v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), "with an approach under which only defined circumstances permit successive collateral attacks." *Taylor v. Gilkey*, 314 F.3d at 836 (citing *Burris v. Parke*, 95 F.3d 465 (7th Cir.1996) (en banc)). In considering the scope of collateral remedies remaining to federal prisoners after the AEDPA, "§ 2255 ¶ 8 means . . . that prisoners today are never *entitled* to multiple collateral attacks, so that their inability to obtain another round of litigation cannot demonstrate that § 2255 as a whole is 'inadequate or ineffective to test the legality of . . . detention.'" *Gray-Bey*, 209 F.3d at 990 (emphasis in original). Thus, in *Valona v. United States*, 138 F.3d 693 (7th Cir.1998), the court observed that nothing in the statutory scheme under AEDPA "implies that a federal prisoner may use a petition under § 2241 to call into question the validity of a conviction or sentence that has already been subject to collateral review."

Federal law providing for collateral review of conviction and sentence does not guarantee that every prisoner will obtain a review on the merits of a constitutional claim, but that every prisoner will at some point have the *opportunity* for such review. *See, e.g., Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir.1999). "The essential point is that a prisoner is entitled to one unencumbered opportunity to receive a decision on the merits." *Potts v. United States*, 210 F.3d 770 (7th Cir.2000).

There is no question concerning what Cueto is claiming in this action. He is claiming that his convictions are unlawful. However, there is a substantial question concerning whether the remedy sought by Cueto is available to him. He

has invoked a statutory remedy wrapped in the appearance of a constitutional blanket. The United States disputes that this statutory remedy extends to the present circumstances or that the constitutional provision has any role.

V. Discussion

A. Remedy via Statutory Action for Writ of Habeas Corpus

Has Cueto shown with respect to his claims that his remedy via § 2255 is inadequate or ineffective? In answering this question with respect to each of Cueto's claims, three recurring points are noted. The first is the fact that Cueto would now face a procedural barrier in the trial court does not render his § 2255 remedy inadequate or ineffective. *Montenegro v. United States*, 248 F.3d 585, 594 (7th Cir.2001) ("[t]he savings clause is not intended to save prisoners from the statutory restrictions delineated by Congress"), *overruled on other grounds by Ashley v. United States*, 266 F.3d 671, 672 (7th Cir.2001); *In re Davenport*, 147 F.3d 605, 608 (7th Cir.1998) (noting that it cannot be right and would nullify the AEDPA limitations if a prisoner, prevented from obtaining relief under § 2255, could simply turn to § 2241). The second is that the present proceeding is not one in which a claim presented in Cueto's direct appeal can be reconsidered-this court lacks both the authority to undertake such a mission and there would be no doctrinal justification for it. The third is the mere fact that an argument has not previously been made in either the direct appeal or the § 2255 action does not make the § 2255 remedy inadequate or ineffective.

Appendix B

Point One: Cueto contends that all the matters underlying his convictions relate to his publication of a newspaper entitled *"The Eastside Review."* He contends that it is the publication of the newspaper which is the overt act alleged to complete the conspiracy, and which is also the corrupt motive underlying the obstruction counts of which he was convicted. He asserts that his activities related to the publication of the newspaper were protected under the First Amendment. The best manner in which to understand this claim is as a challenge to the sufficiency of the evidence, as a challenge to the nature of the evidence in relation to the crimes of which he was convicted, and as a challenge to the conduct in which he engaged relative to the conduct which could have been proscribed by the criminal statutes under which he was charged and convicted.

A challenge to the sufficiency of the evidence was made in Cueto's direct appeal. The evidence was found sufficient by the Court of Appeals:

> We recognize that Cueto may initially have been hired in his professional capacity to provide legal advice and representation, but it was equally reasonable for the jury to conclude from the evidence presented at trial that his representation also was undertaken for a criminal purpose in an attempt to protect the illegal gambling operation and to prevent government interference and that Cueto's role in the conspiracy was to use the power of his office as an attorney for the corrupt purpose of impairing, impeding, and obstructing the investigation, indictment, and prosecution of

> the illegal gambling and racketeering enterprise. Similarly, it was reasonable for the jury to conclude that Cueto agreed to participate in this scheme for his personal financial gain; the income generated by Venezia's illegal gambling operation was used to fund additional business ventures pursued in partnership with Cueto. Examining the evidence in the light most favorable to the government, we conclude that a rational jury could have found that the government proved the elements of *§ 371* beyond a reasonable doubt and that Cueto conspired with others and purposefully and knowingly participated in a corrupt scheme to defraud the United States.

United States v. Cueto, 151 F.3d 620, 636 (7th Cir.1998), *cert. denied*, 536 U.S. 1016 (1999).

Cueto's argument that he engaged in lawful conduct is a rehash of the simply-practicing-law argument he presented in his direct appeal. The sort of innocence for which the constitutional claim to collateral relief via the savings clause would be available occurs when, even if the trier of fact believed everything charged in the indictment, these acts just do not constitute a crime. *See Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). Cueto makes such an argument, but only supported by his view of the evidence. When the evidence is viewed as the Court of Appeals and quite obviously the jury saw it,

Cueto's argument does not hold water.[5] Furthermore, the statutes he was convicted of violating have not undergone substantial revision or interpretation, nor have they been revoked, since the time of his conduct or trial, in a manner warranting retroactive relief. *In re Davenport* 147 F.3d at 611 ("A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion."). This court need not revisit an issue previously raised and decided with respect to a habeas petitioner. *See Olmstead v. United States*, 55 F.3d 316, 319 (7th Cir.1995) ("Although *res judicata* does not apply in § 2255 proceedings, the court may still exercise its discretion not to reconsider issues already decided at trial, on direct appeal, or in a prior § 2255 proceeding."). There is no possibility that Cueto's convictions hinge on conduct Congress never intended to criminalize.

Point Two: Cueto contends that he could not be convicted of obstruction of justice because his actions which are alleged to be "corrupt endeavors" occurred when there were no judicial proceedings in existence for him to have obstructed. He also contends that it was impossible to conspire or agree to obstruct judicial proceedings that were not in existence.

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5. Moreover, Cuteto conveniently ignores the fundamental concept that an overt act, committed in furtherance of a conspiracy, can be an act that is, by itself, a legal act, so long as it furthers a criminal conspiracy. *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942). Similarly, § 1503 penalizes even legal acts committed with a corrupt motive. *Cueto*, 151 F.3d at 631.

Cueto argues that he presented that argument in his direct appeal, but the Court of Appeals "converted" his impossibility argument into a sufficiency of the evidence argument. This is a direct challenge to the adequacy of the appellate court's treatment of his appeal. His suggestion that he can pursue collateral challenges to his conviction until he receives a decision which both recognizes the claim in the manner he presents and resolves the claim in a manner he finds correct or persuasive is absurd. Although in the *Sanders* "world," see *Taylor*, 314 F.3d at 836, such a strategy might be conceivable, in the world of the AEDPA that is no longer the case. *Jiminian v. Nash*, 245 F.3d 144, 147-48 (2d Cir.2001) (§ 2241 relief not available because petitioner could have raised claim on direct appeal or in prior § 2255 attack, thus § 2255 remedy not inadequate or ineffective); *Longbehn v. United States*, 169 F.3d 1082, 1083 (7th Cir.1999) (same).

Point Three: Cueto contends that the prosecutor assigned to his case should have been disqualified because of her involvement in other litigation, that the prosecutor acted in an irregular manner when the charges against Cueto were filed, and that these circumstances spilled over into evidentiary rulings made during the trial. Prior to trial, moreover, Cueto unsuccessfully sought dismissal of the Indictment against him on the ground that the United States Attorney had a conflict of interest. He relies on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), in which a plurality of the Supreme Court concluded that the appointment of a private prosecutor is structural error not subject to harmless error analysis, to support this claim.

Cueto explains that this claim could not have been included in his direct appeal because the record on the motion to dismiss, which was denied without a hearing, was inadequate to support the claim, and that it was not presented in his § 2255 motion because to have done so would have resulted in additional charges being filed against him. He argues that these circumstances constitute "cause" for failing to present the claim at an earlier point. However, his assertion that he was barred from raising this earlier because of the fear of additional changes is based solely on his bald conclusions and no facts. Again, the Petitioner assumes a result without a basis.

Cueto's attempt to show "cause," especially in relation to the § 2255 action, is lame. It is, moreover, beside the point. The test for "inadequate or ineffective" under § 2255 ¶ 5 is not "cause and prejudice." Either the direct appeal or the § 2255 would have been an appropriate vehicle through which to raise the claim. A speculative fear that his opponent would try to base criminal charges on the Petitioner's claims of error does not satisfy this standard.

Point Four: Cueto contends that he was denied his right to self-representation. He claims that he wanted to represent himself along with his counsel and that Judge Limbaugh refused to allow him to have hybrid representation.

Cueto contends that *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), guarantees the right of hybrid representation. Not so. The trial court is not required to permit "'hybrid' representation," as a "defendant does not have a right to choreograph special appearances by counsel." *Id.* at 183.

This claim, in any event, is fully typical of the type of error which could have been presented in Cueto's direct appeal. *See, e.g .*, *United States v. Chavin*, 316 F.3d 666, 671-72 (7th Cir.2002). Cueto's explanation for not raising this in earlier proceedings is that to have raised such an argument would have resulted in another obstruction indictment. This explanation is less than feeble, for there is not the slightest legal or factual basis for supposing that he would have again been charged with crimes against the United States had he expanded the arguments he elected to present in his direct appeal to include the claim that his right to self-representation was violated. His unfounded speculation about this, again, does not make it so. If this claim had not been available in Cueto's direct appeal, moreover, he could have presented it in his § 2255 action under certain circumstances. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir.1996) ("[a]n issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for the failure to raise the claims on direct appeal and actual prejudice from the failure to raise those claims, or if a refusal to consider the issue would lead to a fundamental miscarriage of justice") (citing *Reed v. Farley*, 512 U.S. 339, 354, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994)).

As to the fourth claim, therefore, the court concludes that Cueto's remedy through § 2255 was not inadequate or ineffective to test the legality of his conviction.

Points Five and Six: Cueto contends that Judge Limbaugh unduly restricted Cueto's testimony on direct examination and, therefore, he was denied the right to testify. He also contends that his Sixth Amendment right to have

compulsory process for obtaining witnesses in his favor was denied. What he means through this claim is that a bevy of defense witnesses were not permitted to testify.

The assignment of error relating to the exclusion of a defendant's proffered evidence at trial, even when that exclusion is lodged as the violation of a defendant's right to testify or to compulsory process, is fully within the norm of appellate practice. *E.g.*, *United States v. Gant*, 396 F.3d 906 (7th Cir.2005). Indeed, Cueto challenged three such rulings in his direct appeal. 151 F.3d at 636-38. He also argued that his Sixth Amendment right to confront witnesses was violated through a restriction on his cross-examination of Venezia with his grand jury testimony. *Id.* at 638. Other evidentiary rulings, if preserved, could have been included as error on appeal. Cueto argues otherwise, stating that for him to have done so would have resulted in an additional indictment against him for obstruction. He also states that he would have been acquitted if the witnesses had testified.

Cueto's showing is inadequate. He was not indicted for filing an appeal, nor for presenting certain arguments in that appeal. There is not the slightest legal or factual basis for supposing that he would have again been charged with crimes against the United States had he expanded the arguments he elected to present to include the claims that his effort to introduce the testimony of certain individuals and his own testimony were curtailed by Judge Limbaugh's rulings during the course of the trial. As to the second factor Cueto offers, this is the grist of everyday appellate practice. There is the suggestion of error in the appellate decision, but that is not a showing that § 2255 is inadequate or ineffective. It does not

suggest any infirmity or deficiency in the procedure available to Cueto via § 2255 or, in this instance, in his direct appeal.

As to the fifth and sixth claims, therefore, the court concludes that Cueto's remedy through § 2255 was not inadequate or ineffective to test the legality of his conviction.

Point Seven: Cueto contends that his right to confront witnesses was denied because a transcript of Albert Romanik's grand jury testimony was admitted into evidence over his objection.

Romanik did not testify at trial. The rationale behind the admission was *Federal Rule of Evidence* 801(d)(2)(E), a statement of a co-conspirator during and in furtherance of the conspiracy. Cueto contends this denied him the right of cross-examination, and if he had been able to confront this testimony, he could have shown that it was true, rather than false as contended by the government. Cueto contends that the decision in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), is an intervening change of law which rendered Romanik's grand jury testimony inadmissible. This claim does not support relief on that basis, however, because (a) the present law on this point is expressed in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and (b) the Seventh Circuit Court of Appeals has very recently held that even *Crawford* does not apply retroactively. *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir.2005).

Cueto makes one undeveloped comment that prosecutor Miquelon argued to the jury that Romanik's guilty plea was

vicariously applicable to him. This was raised in Cueto's § 2255 action. The argument that there was error in the resolution of the claim does not suggest structural deficiency in the § 2255 process, and the claim itself self-evidently reveals that Cueto does not rely on a change in law that post-dates his § 2255 motion. This is fatal to Cueto's effort to invoke the savings clause of § 2255.

Point Eight: Cueto contends that he was denied the right to confront witnesses with respect to Thomas Venezia in two respects. He contends that the government agreed not to prosecute Venezia for a RICO murder. Judge Limbaugh refused to allow the defense to cross examine Venezia regarding this aspect of the agreement. Judge Limbaugh also refused to allow Cueto to confront Venezia with notes that Venezia had made during the initial criminal prosecution of him.

These are claims of trial error. Cueto asserts that the claim regarding the disallowance of the notes taken by Venezia during the initial prosecution of him was presented in his direct appeal, but was simply ignored by the Court of Appeals. Whether this is the case or not, these claims do not meet the standard of "inadequate or ineffective" as established in the Seventh Circuit and as previously explained and applied as to other claims.

Point Nine: Cueto contends that he was denied the right to a trial. Cueto argues that the pervasive violation of his rights under the Sixth Amendment — *at trial* — was structural error (perhaps several times over, judging from

his rhetoric) and this resulted in the proceeding which he acknowledges occurred not constituting a trial.

The state slogan of Illinois is "Land of Lincoln." An epigram widely attributed to Abraham Lincoln is appropriate in this case: How many legs does a dog have if you count his tail as a leg? Four. You can call a tail a leg if you want to, but it does not make it a leg. So it is with Cueto's not-a-trial argument; he can call the proceeding something other than a trial, but if it was a trial his refusing to recognize that fact does not make the proceeding something other than a trial. The point is that Cueto de-labeling his trial does not change history, even though he argues that the history of his trial is replete with violations of his Sixth Amendment rights. This invites consideration of his dogmatic claim of structural error.

> There are two kinds of constitutional error at trial. In *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court recognized a distinction between structural defects, which require reversal, *per se*, and trial errors, which require a reviewing court to engage in harmless error analysis. Structural defects are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 309, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302. A "structural error" applies to the entire trial and requires reversal because it "infects the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Furthermore, a structural error will "'necessarily render a trial

> fundamentally unfair.' Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). A trial error, on the other hand, is an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460. A right is "substantial" when it is one of the pillars of a fair trial. Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a "substantial" right even if it were certain that a jury would convict. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

Harrison v. Anderson, 300 F.Supp.2d 690, 698-99 (S.D.Ind.2004), aff'd, 428 F.3d 652 (7th Cir.2005).

Structural errors have been found in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing precedent

finding structural errors for: (1) a total deprivation of the right to counsel; (2) lack of an impartial trial judge; (3) unlawful exclusion of grand jurors on the basis of race; (4) denial of the right to self-representation at trial; (5) denial of the right to a public trial; and (6) an erroneous reasonable doubt instruction to the jury). Cueto's sense of the errors he believes occurred before and during his trial do not qualify as structural error, for they are not among the categories noted in *Johnson*, and because his contentions are case-specific. *See Neder*, 527 U.S. at 14 (structural errors implicate basic protections, and render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence; it is a categorical determination).

There was, of course, a trial, and Cueto participated in every phase of it. The advent of structural error as a subset of constitutional error preceded Cueto's trial by six years. Structural error can be argued in a direct appeal, as was the avenue taken in *Johnson* and in *Neder*, just to name two of the cases already mentioned in this discussion. Further, at least in the context of a state prisoner seeking federal habeas corpus relief, *Ward v. Hinsley*, 377 F.3d 719, 725 (7th Cir.2004), explains that such errors are not thereafter exempt from the doctrine of procedural default. As with several of his other claims, Cueto claims that he could show cause for and prejudice from his failure to present this claim previously, but this is not the proper test.

In an addendum, Cueto states that *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), is an intervening change of law which implicates the structural error rule of *Sullivan*

v. Louisiana. Based on *State Farm*, he contends that a person cannot be punished criminally for conduct which is lawful. It is true that in *State Farm* the Supreme Court noted that a state cannot punish a defendant for conduct that may have been lawful where it occurred, 538 U.S. at 421, but this was hardly a change in the law. The lawfulness of Cueto's conduct has already been fully assessed, both through his jury trial and in his direct appeal. There is no intervening case decision which draws this into question.

Point Ten: Cueto contends that he was denied a fair trial because Judge Limbaugh was prejudiced against him.

Criminal defendants have a constitutional right to be tried before a fair and impartial judge. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). The due process clause "requires that a defendant receive a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Id.* (citations omitted); *see also In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.").

Two statutes are relevant here: 28 U.S.C. § 144 requires recusal of a judge when there is actual personal bias or prejudice, while 28 U.S.C. § 455(a) requires a judge to recuse himself when his presiding over a case would create an appearance of bias. *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir.1989).

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The assertion of judicial bias, far from being asserted at this late date, should have been asserted as soon as a record was available to Cueto to support such a claim. *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir.1993) (the motion must be filed "at the earliest moment after [the movant acquires] knowledge of the facts demonstrating the basis for disqualification"). This could have been before trial or, at the latest, in the direct appeal as to any ruling or event occurring before or at trial.

In this Circuit, appellate review of a judge's failure to disqualify himself under § 455(a) may only be obtained by petitioning the appellate court for a writ of mandamus prior to trial. *See United States v. Horton*, 98 F.3d 313, 316-17 (7th Cir.1996); *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir.1985). In contrast to 28 U.S.C. § 455(a), recusal under *§ 144* deals with actual bias and requires the moving party to file a timely and sufficient affidavit in support of the motion setting forth facts that would cause a reasonable person to question the judge's impartiality. *Balistrieri*, 779 F.2d at 1199.

Disqualification under 455(a) was not available once Cueto's direct appeal was concluded. *See New York City Hous. Dev. Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir.1986). Cueto failed to file a timely recusal request under § 144 as to any basis on which recusal could have been sought prior to the conclusion of the direct appeal. "A section 144 affidavit is not timely unless filed 'at the earliest moment after [the movant acquires] knowledge of the facts demonstrating the basis for such disqualification.'" *Sykes*, 7 F.3d at 1339 (quoting *United States v. Barnes*, 909 F.2d 1059, 1071 (7th

Cir.1990)) (internal quotation marks omitted). Cueto did file a motion to recuse in conjunction with his motion for relief pursuant to § 2255. The motion to recuse was denied by Judge Limbaugh, and that ruling was available for appellate review along with the merits of the case. *Troxell*, 887 F.2d at 833. No appellate review occurred in an extended fashion, however, because no certificate of appealability was issued. The only reason such a certificate was not issued, however, is because both the district court and the Court of Appeals found that Cueto failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Appellate review did occur, however, to the extent that the Court of Appeals' denial of his request for the issuance of a certificate of appealability represented its conclusion that Cueto failed to demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented were adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

It is therefore incorrect for Cueto to suggest that the judicial bias arguments were not fully available for development through the conclusion of the direct appeal, to the extent the basis for any such argument was known to him at that stage, or not available at all in the course of the § 2255 proceeding, when in fact the claim of judicial bias was asserted. Cueto suggests that his own views and those of his attorney in the § 2255 proceeding diverged on the subject of whether and how to assert the claim of judicial bias, but that is of no consequence under the Sixth Amendment, *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107

S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Montgomery v. Meloy*, 90 F.3d 1200, 1206 (7th Cir.), cert. denied, 519 U.S. 907, 117 S.Ct. 266, 136 L.Ed.2d 190 (1996), nor for any other discernible purpose here.

Although judicial bias is one of the rare forms of structural error which infects an entire proceeding, *see Harrison v. Anderson*, 300 F.Supp.2d 690, 703 (S.D.Ind. 2004) (citing cases), this claim is not exempt from the rules of procedural default. While procedural default is not precisely the gulf which must be bridged in order to challenge a conviction via § 2241, the point is that all the specifications of judicial bias were available to Cueto at some point during the course of the prosecution, the trial, the direct appeal, and the § 2255 proceeding. This is the antithesis of deficiency in procedures. *Tripati v. Henman*, 843 F.2d 1160, 1162-63 (9th Cir.1988) (§ 2255 motion not inadequate or ineffective despite alleged bias on part of sentencing judge because defendant could move for judge's recusal or disqualification). This claim, moreover, is not one which suggests in any fashion that Cueto's convictions resulted in someone who is actually innocent to be convicted.

Although it would be easy, and fully justified, to conclude that Cueto's claim of judicial bias is entirely without foundation in this record, because "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)), the court must refrain from indulging that route. As explained in *Garza v. Lappin*, 253 F.3d 918, 923 (7th

Cir.2001), "we must not confuse lack of substantive merit with lack of jurisdiction." To do so would be to reach the merits of the claim of judicial bias and thereby determine, either explicitly or implicitly, that the remedy available to Cueto through § 2255 was inadequate or ineffective. Because such a determination is not warranted based on the expanded record or the parties' arguments, this claim fails the savings clause test of § 2255.

As to the tenth claim, therefore, the court concludes that Cueto's remedy through § 2255 was not inadequate or ineffective to test the legality of his conviction.

Point Eleven: Cueto argues that the Indictment which was the subject matter of the trial was not the indictment that was returned by the grand jury.

There is a general rule that an indictment "will not be the subject of independent scrutiny and is given a presumption of regularity." *United States v. Hart*, 513 F.Supp. 657, 658 (E.D.Pa.1981); *see also United States v. Azad*, 809 F.2d 291, 295 (6th Cir.1986) ("A presumption of regularity attaches to grand jury proceedings[.]"). The "mere speculation of irregularity is not enough to entitle the defendant to disclosure of grand jury material." *Hart*, 513 F.Supp. at 658 (citing *United States v. Budzanoski*, 513 F.Supp. 657, 658 (3d Cir.1972)). Additionally, "[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits" and "[t]he Fifth Amendment requires nothing more." *United States v. Powell*, 823 F.2d 996, 1000 (6th Cir.1987) (quoting *Costello v. United States*, 350 U.S. 359, 362-63, 76 S.Ct. 406, 100 L.Ed. 397 (1956)).

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After a careful review of the record and indictment at issue, the court finds no indication that the indictment was not returned by the grand jury as indicated by the record. The court further finds that there was but one indictment returned in which Cueto was named as a defendant. Although in this case there has been considerable independent scrutiny, that effort has simply confirmed the presumption of regularity associated with the indictment returned on July 18, 1996, naming Cueto as a defendant. The events associated with the clerk's handling of the indictment and associated papers, including the concurrence, after the indictment was returned had no effect on the existence or content of the indictment, and have not prejudiced Cueto or drawn into question the subsequent proceedings, including the trial, based on the indictment. *See United States v. Smith*, No. 02-20380 BV, 2004 WL 784521, at *3 (W.D.Tenn. Jan.26, 2004) ("After a careful review of the record and indictment at issue, the court finds no indication that the indictment was not rendered by the grand jury after deliberation. The fact that the defendant allegedly was handed an unsigned indictment at some point after the grand jury proceedings has no bearing on the fact that the record contains a properly entered true bill reflecting both the grand jury foreman's signature and that of the prosecutor."). The Petitioner's convoluted hypothesis that a different four-defendant indictment was actually returned and subsequently mysteriously disappeared, to be replaced by the present one, does not have a scintilla of factual support. It is a fiction of a creative imagination, founded only in rumor and speculation, not credible or reliable evidence.

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The argument that Cueto was not charged or that there were two indictments has been completely explored. The facts this court finds are contrary to the premise of this claim. This claim can therefore proceed no further.

Non-claims: Cueto indicates that many other errors could have been raised through a habeas corpus proceeding, as he says, and "to argue them all would fill a tome longer than *War and Peace.*" A tribunal is hardly compelled to address a matter which slung in this fashion onto a heap of what is already a repetitions, wide-ranging harangue, and this court declines to do so for at least the reason that notice pleading does not suffice in an action for habeas corpus relief. *See Lloyd v. Van Natta*, 296 F.3d 630, 633 (7th Cir.2002).

B. Remedy Directly Under the United States Constitution

Is there any constitutional basis for awarding Cueto relief based on his allegations? Phrased differently, the question is whether, apart from the savings clause of § 2255 and the statutory writ authorized in § 2241, there is any basis in the Constitution itself for granting Cueto the relief he seeks. Although this argument surfaces throughout Cueto's papers, it cannot sustain his position.

At the outset, it must be recognized that the authority of the lower federal courts to issue a writ of habeas corpus is not "inherent" in the mere statutory existence of the lower courts. On the contrary, "the power to award the writ by any of the courts of the United States, must be given by written law." *Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333,

135 L.Ed.2d 827 (1996) (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94, 2 L.Ed. 554 (1807)). *Accord Brown v. Allen*, 344 U.S. 443, 460, 73 S.Ct. 397, 408-409, 97 L.Ed. 469 (1953) ("Jurisdiction over applications for federal habeas corpus is controlled by statute").

> The only reference in the constitution to the writ of habeas corpus is found in Article I, section 9, which states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Even if this clause represented a restriction on judicial, as opposed to legislative, power, the right to habeas review enshrined in the clause does not include the right to have judgments rendered by courts of competent jurisdiction reexamined in collateral proceedings. *See Lindh v. Murphy*, 96 F.3d 856, 867 (7th Cir.1996), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (noting that the writ known in 1789 was the pre-trial contest to the executive's power to hold a person captive, the device to prevent arbitrary detention without trial). In fact, the complete denial of the writ of habeas corpus to challenge federal convictions would not violate the Constitution. *United States v. Anselmi*, 207 F.2d 312, 314 (3d Cir.1953) ("[U]nder the common law in force when the Constitution was adopted, habeas corpus was not available to persons convicted of crime to test the legality of their conviction . . . [a]nd until [1867], this was the rule in the federal courts.").

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Graffia v. United States, 264 F.Supp.2d 674, 680 (N.D.Ill.2003).

> We held in *Lindh v. Murphy*, 96 F.3d 856, 867-68 (7th Cir.1996) (en banc), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), that the writ protected by the Constitution is the writ known in 1789 — the pretrial writ used to thwart unjustified detention by the executive branch — and not the statutory extensions of collateral review later enacted by Congress. What the legislature gave, it may withdraw. "The Suspension Clause is not a ratchet." *Lindh*, 96 F.3d at 868. *Accord*, *Swain*, 430 U.S. at 384-86, 97 S.Ct. 1224, 51 L.Ed.2d 411 (Burger, C.J., concurring); *Schneckloth v. Bustamonte*, 412 U.S. 218, 252-56, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (Powell, J., concurring). Yet although § 2255 ¶ 5 turns out to be unnecessary to ensure the law's constitutionality, it remains in force as a statutory rule of decision.

Taylor v. Gilkey, 314 F.3d at 835.

Accordingly, there is no explicit provision in the United States Constitution which confers on a federal district court the jurisdiction to consider a collateral challenge to a conviction made by a federal prisoner. Cueto's assertion of a general constitutional basis for relief under Article 1, Section 9, Clause 2, of the United States Constitution is unavailing. *Benefiel v. Davis*, 403 F.3d 825, 827 (7th Cir.2005) ("What is protected from suspension is the writ that limits a person's

detention by the executive branch without trial. There is no constitutional entitlement to post-judgment collateral review by the inferior federal courts, let alone to unending rounds of such review.").

It might also be thought that Cueto cites this constitutional provision in order to widen the aperture of the narrow savings clause written into § 2255 ¶ 5. This possibility would also be unavailing, however, because § 2255's limitation of § 2241 habeas petitions does not violate the Constitution's provision against suspension of the writ of habeas corpus. *See Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (substitution of adequate and effective collateral remedy for federal prisoners not unconstitutional suspension of writ of habeas corpus because § 2255 provides "exact equivalent" of habeas corpus petition); *Kaufman v. United States, 394 U.S. 217, 221-22, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969)* (§ 2255 intended to provide remedy "exactly commensurate" with that provided by habeas corpus); *United States v. Brooks, 245 F.3d 291, 292-93 (3d Cir.2001)* (Suspension Clause not violated because petitioner had full opportunity to challenge his detention in District Court, and still may file original petition with U.S. Supreme Court).

VI. Conclusion

"Section 2255 is the primary collateral relief mechanism for federal prisoners, and the savings clause cannot create a detour around § 2255 such that § 2255 is rendered a nullity." *Reyes-Requena v. United States*, 243 F.3d 893, 901 n. 19 (5th Cir.2001). Cueto has failed to show that a motion for relief

pursuant to 28 U.S.C. § 2255 was or is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255 ¶ *5*. He has shown no independent constitutional basis for granting the relief he seeks. "The court's power to enter a judgment of any kind, in favor of either side, depends on the existence of" jurisdiction. *Tisza v. Commc'ns. Workers of Am.*, 953 F.2d 298, 300 (7th Cir.1992). Once a court determines that it lacks jurisdiction, it must proceed no further. *Illinois v. Chicago*, 137 F.3d 474, 478-79 (7th Cir.1998). That is the case here. Based on the findings in Part III of this Entry and the discussion in Part IV, therefore, Cueto's petition for a writ of habeas corpus is denied and this action must be dismissed for lack of jurisdiction. This Entry determines that there is no jurisdictional basis to address the many documents filed by the Petitioner and the prolix arguments and issues presented in them. Petitioner's energetic filing efforts were voluminous, but it is believed that this Entry mentions all of the Petitioner's filings of consequence. Regardless, any motion or other submission not specifically discussed in this Entry is **denied**.

An order of dismissal consistent with this Entry shall now issue.

ALL OF WHICH IS ENTERED this 15th day of December 2005.

s/ John Daniel Tinder
John Daniel Tinder, Judge
Sitting by Designation

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICTOF ILLINOIS

3:02-CV-00777-JDT

AMIEL CUETO,

Petitioner,

v.

E.A. STEPP, Warden,

Respondent.

Order of Dismissal for Lack of Jurisdiction

The Court, having this day issued its Entry Discussing Petition for Writ of Habeas Corpus, now therefore **ORDERS, ADJUDGES, AND DECREES** that Petitioner Amiel Cueto's Petition for a Writ of Habeas Corpus is Denied and this action is **DISMISSED FOR LACK OF JURISDICTION.**

ALL OF ~~WHICH IS~~ ENTERED this 15th day of December 2005.

s/ John Daniel Tinder
John Daniel Tinder, Judge
Sitting by Designation

APPENDIX C — MAY 12, 2006 ORDER OF THE SEVENTH CIRCUIT, DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 12, 2006

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. 06-1099

AMIEL CUETO,

Petitioner-Appellant,

v.

E.A. STEPP, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 3:02-CV-00777

John Daniel Tinder, *Judge*

Appendix C

ORDER

Appellant filed a petition for rehearing and rehearing en banc on March 10, 2006. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D — EXCERPTS FROM DEPOSITIONS OF LOUIS GILDEN AND GERALD GREIMAN

IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS STATE OF MISSOURI

No. 992-01681
Div.1

THE NINETEEN SIXTY-SEVEN CORPORATION,

Plaintiff,

vs.

BONDS ROBINSON, JR.,

Defendant.

Deposition of LOUIS GILDEN taken on behalf of Plaintiff on September 1, 1999

[5] * * *

Q. Thank you. Can you tell me when it was that Mr. Robinson first came to you for representation?

A. Based on that representation of Mr. Leritz, I am going to testify. When he first came to see me? I really can't give you a date on it. It was somewhere in 1994. I don't really remember when.

Q. Okay. And can you tell me in terms of — the original lawsuit was filed on November 22, 1995. Can you tell me in months how long before it took before you put that together?

A. The suit was filed what day?

Q. November 22, 1995.

A. Well, he had probably been seeing me for a year or better or something like that.

[6] Q. Okay. And do you know how he came to be your client?

A. I really don't recall that.

Q. Okay. Have you ever talked to an attorney by the name of William E. Coonan?

A. I have.

Q. And on how many occasions, sir?

A. I would say probably maybe two occasions. I am giving my best estimate, a recall of what occurred.

Q. And were these phone calls?

A. Telephone calls.

Q. All right. Was there any other correspondence between you and Mr. Coonan?

A. None.

Q. And on these two occasions that you remember on these telephone calls, can you tell me when these were?

A. Now, I can't give you a date, but it would have been probably after the notice of dismissal had been filed in the Federal District Court under Rule 41a, I believe. And I think it would have been after that that the conversations took place.

[7] Q. Okay. So, prior to that dismissal you had never talked to him before?

A. Not as I recall it.

Q. Had you ever talked to any other U. S. Attorney prior to Bonds Robinson's lawsuit being filed?

A. You mean relating to Bonds Robinson?

Q. Relating to Bonds Robinson in any way

A. I remember a brief phone call and I don't know who made it, whether it was made by the U. S. Attorney's office or myself, a short conversation with Marian Miquelon, and I can't spell the last name.

Q. M-i-q-u-e-l-o-n.

A. But that was a brief conversation. I don't recall — I don't recall the substance of the conversation.

Q. When was it, do you know? Before you filed the lawsuit?

A. I can't give you a time as to whether it was before or after and I just don't recall it.

Q. Okay. Was it, in terms of this notice of dismissal, before or after the dismissal?

[8] A. It probably would have been before the notice of dismissal.

Q. Okay. You don't remember anything about that call with her?

A. Nothing other than I remember talking to her. I don't recall the substance of what we talked about.

Q. Okay. And she called you?

A. I said I don't recall whether I made the call or she made the call. I don't recall that.

Q. Okay. But you believe it was during the pendency of the lawsuit?

A. Well, I can't say it was during the pendency — you mean the pendency of the lawsuit or before? I don't recall the time span or the period or the date. I don't. So, I can't

relate it to anything as I recall it to the lawsuit that was, the date of the lawsuit that was filed or the prior conversations that I had with Bonds Robinson in my office.

Q. And you are telling me as you sit here today that you have no recollection of any substance of this call?

[9] A. I don't know the substance of the telephone call.

Q. Now, did she ever, Miss Miquelon, ever call Charlie Oldham at all?

A. I don't know.

Q. Did Mr. Coonan, Liam Coonan, did he ever talk to Charlie at all, your partner?

A. Not to my knowledge.

Q. In the two calls with Mr. Coonan, what did they pertain to?

A. They related, I think, to the fact that the case had been dismissed and I don't remember but there may have been something where Mr. Coonan had stated, and I can't — whether he was going to get counsel for Mr. Robinson and I just don't recall exactly what was talked about but it seems like it had to do with getting some counsel for Mr. Robinson so he could pursue the lawsuit that had been filed —

Q. Okay.

A. — and was now dismissed.

Q. And what about the second call?

A. As I say, I can't segregate the calls and I can't say what happened in one call or the [10] other, but I think both phone calls, you know, as I best recall it, would have related to seeking counsel for Mr. Robinson.

Q. And it would have been seeking new counsel to take over the case?

A. That is true.

Q. Okay. Now, other than Mr. Coonan and Miss Miquelon, did any other U. S. Attorneys call you?

A. Not that I recall. Let me say this.

Q. Regarding this suit again, I am talking about.

A. No one has ever — not to my knowledge. I don't recall any other U. S. Attorney talking to me —

Q. Any FBI?

A. — relating to the Bonds Robinson case.

Q. Any FBI agents talking to you?

A. No FBI agents.

Q. Any correspondence at all from Coonan, Miquelon, or any federal agents at all?

A. Not to me to my knowledge.

Q. Okay. As Mr. Leritz indicated a little earlier, part of the response —

[11] A. Let me say this. There were two phone calls, it could have been one or two. I know I had a conversation with him. I can't say it was definitely two.

Q. Okay. And you don't know if he called you or you called him?

A. I don't recall. I might say that I don't even remember whether I called him at the instance of Mr. Robinson, or whether the call was initiated by Mr. Coonan. I don't recall that.

Q. Okay. The ultimate issue what I am trying to get around to and Mr. Leritz touched on before is Mr. Robinson relied on advice of counsel in filing the lawsuit and now I am going to talk to you in a minute about that and then I just wanted to know if any other lawyers were giving him advice, if that advice of counsel that is pleaded in the answer came from anybody besides you that you know of?

A. Well, as I best recollect, Mr. Robinson when he came in to see me, said that he had had a hard time locating a

lawyer to represent him, so I don't know of any other lawyer that he [12] talked to that gave him any particular legal advice.

Q. Do you know if he talked to Mr. Coonan about his case?

A. That I wouldn't know.

Q. Okay. And you filed an original lawsuit here on November 22, original complaint in the Southern District of Illinois, correct?

A. That is true.

Q. Okay. And as I understand it, I remember an article in the newspaper at the time that said this complaint had been sealed at some point until a later time. Do you know anything about that or why that was done?

A. Well, let me say as I recall it, Charlie and I went to the cashier's office — well, to the Federal District Court and filed the lawsuit.

Q. On November 22?

A. If you say the date is November 22. It was filed and that would have been the date. I mean, I trust the clerk's stamp. And on that particular date, I assume, if that was the date, Charlie and I went upstairs to the U. S. [13] Attorney's office and gave them a copy of the lawsuit.

Q. You went to the U. S. Attorney's office?

A. We did. We left a copy of the lawsuit as a courtesy copy to them.

Q. Why would you do that? What did they have to do with it?

AvI thought at that time there was some litigation going on. I am not sure whether there was or was not, I don't know, but I felt that there was something going on whether I read about it or whether it was something that Mr. Robinson told me or whether I gathered the information from some other source that the U. S. Attorney was involved in the matter in some way. I don't know whether there was any pending litigation at that point. I don't know whether there was a criminal trial going on involving one or more of the defendants. I don't remember that. And we left the courtesy copy with the U. S. Attorney's office.

Q. Which U. S. Attorney? Do you remember who you gave it to?

[14] A. I think, as I recall it, I think I have only met him once. It was Norman Smith. Is that the fellow's name? And I am not sure whether Miss Miquelon was there or not. There was no conversation. Just left it.

Q. This was on the date of filing?

A. Right. Just left the lawsuit.

Q. And you personally handed it to Norman Smith?

A. When you say personally, either Charlie or I handed it to him.

Q. They didn't tell you to do anything with it or not do anything with it?

A. No. Then I learned later that the file had been sealed or the case had been sealed and I just know this by not from any personal knowledge of anybody telling me about it. They didn't want in any way to invade whatever was going on in any criminal proceedings that were going on.

Q. But you had, and I don't mean to interrupt you, but you had nothing to do with the case being sealed?

A. Nothing. We had nothing to do with [15] that.

Q. You and Charlie didn't do any of that?

A. Not to my knowledge. I don't recall anything. It was sealed.

Q. But you know in a federal criminal court, you filed enough lawsuits to know when you file this in court, you have to mail — you were going to do mail service and did do mail service, right?

A. Well, you mean after that with respect to getting the parties served you mean?

Q. Right. To get the parties served.

A. Then you filed a Rule 11 on me.

Q. I understand. What I am getting at is, you waited for some period of time before you mailed them out and I am asking, my question is, did somebody tell you to delay mailing service out?

A. I really don't know.

Q. Because there was a delay.

A. I don't know that.

Q. Did Mr. Smith or Miss Miquelon say hold it and don't serve the defendants while this trial is going on?

[16] A. I don't recall that conversation.

Q. But you did wait to mail them for some period of time?

A. If there was a wait, I don't recall it at this point. I can't tell you that I recall anything about the waiting period other than I remember that there was a time within which the lawsuit was resting in the District Court and I don't know for what period of time and I can't tell you as to anything about the fundamentals of why service wasn't obtained later.

Q. And did you ever talk to Judge Stiehl, who was assigned the case, did he tell you not to serve anything?

Appendix D

A. I have never talked to Judge Stiehl to my knowledge.

Q. The only people you talked to then were the U. S. Attorneys or gave them the courtesy copy?

A. Charlie and I went upstairs, wherever the floor is of the U. S. Attorney, and left a courtesy copy.

* * * *

Appendix D

**IN THE CIRCUIT COURT FOR
THE CITY OF ST. LOUIS
STATE OF MISSOURI**

No. 992-01681
Division 1

THE NINETEEN SIXTY-SEVEN CORPORATION,

Plaintiff,

vs.

BONDS ROBINSON, JR.,

Defendant.

Deposition of GERALD GREIMAN taken on behalf of Plaintiff on August 20th, 1999

[4] * * *

Q. Now, have you ever heard of an underlying case here called Bonds Robinson vs. Thomas Venezia, Amiel Cueto, and a bunch of other people at The Nineteen Sixty-Seven Corporation?

A. I believe so.

Q. A libel or slander action?

A. I believe I have seen a pleading relating to what I think is the case you ask me about and I have seen some newspaper articles about the larger controversy.

Q. Did you ever meet with Bonds Robinson, Jr.?

A. No.

Q. Did you ever hear from Bonds Robinson, Jr. by telephone, writing, or any other fashion?

[5] A. No.

Q. Did anyone other than Bonds Robinson ever contact you regarding the possibility of representing him in that lawsuit?

A. Yes.

Q. Who would that have been?

A. I believe it was somebody in the U.S. Attorney's Office named Liam Kunin or something like that.

Q. Do you know — had you known Mr. Kunin before that?

A. I don't believe so.

Q. What did he tell you when he called you? Was it a telephone call?

A. It was a telephone call. I don't remember exactly. It was a fairly brief conversation, but I believe it was something to the effect that there was a lawsuit pending by Bonds Robinson and he was looking for a lawyer to take over the case, and would I be interested in taking a look at it.

Q. To clarify your testimony, just a grammatical matter, you say he was interested in you taking over the case. By "he", do you mean [6] Liam Kunin or do you mean Bonds Robinson?

A. I understood that Bonds Robinson was looking for somebody to take over the case.

Q. And what did you tell Mr. Kunin when he called you?

A. I told him I would be happy to take a look at it and asked him to send me some papers on it.

Q. Who sent you the papers? Where did they come from, in other words?

A. I'm not sure.

Q. Did you receive them in the mail?

A. I believe so.

Q. Do you recall whether they were mailed by Bonds Robinson himself or by some other party?

A. I really don't know.

Q. Did you save those documents?

A. I have the Complaint, yes.

Q. And the Complaint was what was sent to you?

A. Yes.

Q. Was that Complaint signed by Lou Gilden or Charles Oldham?

[7] A. I don't know. I believe it was.

Q. Okay. So, in other words, then, if we are trying to place this in the context of time, you were contacted after the lawsuit had already been filed by other lawyers?

A. I believe it was my understanding that the suit had already been filed. I remember Lou Gilden being involved and I believe I was told in my phone conversation that Mr. Gilden for health reasons or whatever was looking to get out of the case and that Mr. Robinson was looking for somebody to take it over from Mr. Gilden.

Q. How many conversations did you have with Liam Kunin in your whole life right up until today?

A. I believe two.

Q. And that was the first one that you just have been describing to us?

A. Yes.

Q. When was the other?

A. The other would have been sometime later after I had looked at the Complaint.

Q. And you called him back to tell him [8] what your decision was about taking over the case. Is that what you are saying?

A. Yes.

Q. What did you tell him?

A. I told him I wasn't in a position to take it over.

Q. What were your reasons for that, if you recall?

A. It looked to me like a substantial undertaking in terms of commitment of time and scope of work. I understood that Mr. Robinson was looking for somebody to take it on a contingent fee basis. Given what else I was doing in terms of my practice, I just did not want to get involved in that kind of a contingent fee case at that point.

Q. Did Mr. Kunin tell you how he got your name?

A. I don't believe he did.

Appendix D

Q. Again, I think you testified that you have never spoken to or seen Bonds Robinson personally?

A. That's right.

* * * *

APPENDIX E — REDACTED VERSION OF PETITION FOR WRIT OF CERTIORARI IN *VENEZIA v. ROBINSON*, FILED BY CUETO IN THE SUPREME COURT ON MAY 31, 1994, UNDER THE NUMBER 93-1929; SAME MARKED AS GX 85-12

IN THE SUPREME COURT OF THE UNITED STATES

Term: October, 1993

THOMAS VENEZIA,

Plaintiff-Petitioner,

v.

BONDS ROBINSON, JR.,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AMIEL CUETO
Counsel of Record
7110 West Main St.
Belleville, IL 62223
(618) 277-1554

Appendix E

* * *

The letter to State's Attorney Haida was hand-carried to him by Venezia's lawyer — Amiel Cueto. (R. 12, Exh.2. pp. 46-47) Cueto delivered the letter to Haida at Haida's office on August 28, 1992, and Cueto and Haida discussed Robinson's bribe and extortion plot; they decided that Haida would call Robinson to the courthouse on September 1, 1992, on the pretext of a hearing, so that Cueto could subpoena Robinson to testify in the chancery court on that day; and that in fact was done. (R. 12, Exh. 2, p. 4) Robinson was served with both a subpoena and a Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. (R. 12. Exh. 2, p. 6) An evidentiary hearing was held, and at the conclusion the state court issued a preliminary injunction (R.2)

* * *

Why would the count of appeals report this false statement about Tom Venezia?

The above statements by the Seventh Circuit Court about Tom Venezia are false, malicious (that is, published with knowledge that the statements were false), and defamatory. Why would the court say these outrageous things? One wonders whether that is something going on here other than the scholarly resolution of legal issues. Which leads to the argument on this point.

* * *

Appendix E

CONCLUSION

The State's Attorney and Venezia's lawyer together agreed on a plan to stop Robinson's extortion, and the State's Attorney called Robinson to the courthouse on a pretext. This was done on September 1, 1992, in order to set Robinson up for Venezia's preliminary injunction hearing.

APPENDIX F — LETTER CUETO WROTE TO STATE'S ATTORNEY HAIDA ON JANUARY 21, 1994, MARKED AS GX 28-12

CUETO, CUETO & CUETO, Ltd.
Attorneys at Law
7110 West Main Street
Belleville, Illinois [illegible]

* * *

January 21, 1994

Mr. Robert Haida
State's Attorney
St. Clair County Building
10 Public Square
Belleville, IL 62220

Dear Bob:

I hate to be a pest, but we are reaching critical mass in the Bonds Robinson, Jr. case. There are a number of civil matters that have to be resolved (including an appeal in U.S. Seventh Circuit Court), and I have to move. I can get the deposition of Tony Joynt. He will have to admit when he's under oath that he delivered money to Robinson (although Joynt has told people that this money was for a loan). In any case Robinson has set himself up for numerous counts of perjury. I would ask you to please move on this no later than February 18, 1994, which is four weeks from the day you receive this. If that is a problem, please give me a call. I think that if we have to, I can proceed on the civil matters without prejudicing your criminal case.

Appendix F

Very truly yours,

CUETO, CUETO & CUETO, LTD.
s/ Amiel Cueto
AMIEL CUETO

AC/jk

APPENDIX G — TRANSCRIBED INTERVIEW OF DONALD DULLE

Mr. McDowell: My name is Lawrence A. McDowell, Jr. I am at 1309 Convention Plaza, St. Louis, Missouri 63103. Today's date is May 15, it is approximately 11:45 a.m., Central Standard Time. I am on the phone with Mr. Don Dulle. I am going to take a recorded statement over the phone from Mr. Dulle.

Q. Mr. Dulle, you understand that I am recording this phone conversation?

A. Yes, I do.

Q. Okay. You are voluntarily giving me this statement?

A. Right.

Q. Okay. Can you state your full name please?

A. Donald L. Dulle, D-U-L-L-E, Jr.

Q. Okay, and what is your current address?

A. My address is Post Office Box 527, Whitefish, Montana 59937.

Q. Okay, and where do you presently work at?

A. Blasett Beverage Company, 1380 Highway 2 West, Dallasville, Montana 59901.

Appendix G

Q. At one point in time did you work for Illinois Distributing in Belleville, Illinois?

A. Yes I did.

Q. And what was your position there?

A. I started in November of 1982, as the operations, excuse me — operations manager and I was employed at that till July of 1987, and I was promoted to assistant general manager and that's in January of 1991; I was promoted to general manager until December of 1995.

Q. Okay. When you were employed at Illinois Distributing, did you ever meet Bonds Robinson?

A. Yes, I did.

Q. And who was he?

A. He was the representative of the Illinois Liquor Control Commission and the state Inspector.

Q. Okay. When do you think the first time you might have met Bonds Robinson was; approximate month and year?

A. Oh, I'd have to say it was sometime around 1985-86, in the summertime.

Q. Okay, and when was the last time you probably saw Bonds Robinson?

Appendix G

A. The last time I saw Bonds Robinson was probably sometime in 1994.

Q. Okay. How often would you see Bonds Robinson at the distributorship? I assume that's where you's see him at is at the distributorship?

A. Right

Q. And how often would he be around there?

A. He probably came around our place there three-four times a year.

Q. Three or four times a year? Do you think that it was unusual for a liquor control agent to be around a distributorship that often, or is that in the course of their duties as liquor agent to stop by three or four times a year?

A. Well, since Illinois Distributing Company while I was there was never issued a violation of any of the Illinois Liquor Control laws or any problems like that, and I feel that it was kind of unusual that he — he was there paying the visits that he was paying.

Q. Okay. Did Mr. Robinson ever attempt to purchase a vehicle from Illinois Distributing?

A. He did. He tried to purchase a Chrysler car around 1991 that our previous general manager had driven and he had retired. He tried to purchase that vehicle from us.

Q. Did he ever make an offer; a monetary offer for — to purchase the vehicle?

A. Never a formal offer. Just In conversation — that he would be willing to pay for it, and we refused to sell it to him.

Q. Do you remember when this was approximately?

A. That was in the beginning part of the year of 1991.

Q. 1991. Okay. Did Mr. Robinson ever attempt to buy der — buy beer, excuse me, directly from the distributorship?

A. Yes, sir.

Q. Did he buy it from you, one of your agents or from somebody else at the distributorship?

A. He bought it from one of our — well, one of the employees at Illinois Distributing Company.

Q. So, he did purchase it and he paid cash for it or he wrote a check?

A. Yes, he paid cash for it.

Q. Okay. Is — are you allowed to sell — are distributorship allowed to sell to individuals or only to retailers?

A. Only supposed to sell to licensed retailers.

Q. Okay. Do you remember approximately when it was that he bought this beer?

A. That was sometime in — I would have to guess sometime around 1986-87, somewhere around there.

Q. Wasn't it coincidental with his wife graduating?

A. That's what I seem to remember — his wife was graduating or some kind of graduation.

Q. Okay. I mean we talked about the vehicle and we talked about purchasing the beer. Would he go through you or would he go through Tony Joynt?

A. He would go through Tony Joynt.

Q. Okay, end Tony Joynt is?

A. Is the president of Illinois Distributing Company.

Q. Okay. Are you aware of any time at all that Mr. Robinson tried to sell anyone at Illinois Liquor Distributing pantyhose?

A. I was told by Tony Joynt that Bonds Robinson had been attempting to sell him some pantyhose.

Q. Okay, and did Mr. Joynt buy the pantyhose?

A. He told me that he did.

Q. Do you remember how much money he paid for the pantyhose, or — what — how much did he say he paid for the pantyhose?

A. I can't remember the exact dollar amount — somewhere around $500.00.

Q. Okay. Do you know if he paid in a check or cash form?

A. I'm not aware —

Q. Okay. Did he ever receive the pantyhose?

A. To my knowledge, he never did.

Q. Did he ever say anything to you about the pantyhose?

A. Just that Bonds had come to his house and try to sell him those pantyhose and he gave him the money and never got his pantyhose.

Q. Okay. Outside of our questioning here, do you have anything further to add about Mr. Robinson?

A. No, I don't.

Appendix G

Q. Okay. This is going to conclude this phone interview. Thanks a lot, Don, I appreciate your time, and if we need to get a hold of you again, which we probably will, I'll contact you at your office.

A. Thank you.

* * * *

APPENDIX H — ORDER OF JUDGE LIMBAUGH, WHICH EXCLUDED DULLE, MILLER AND KARRAS

6/3/97 491 MINUTES OF DAY 30 OF JURY TRIAL (jmf): before Judge Stephen N. Limbaugh DENYING the following motions pursuant to rulings at side bar: motion to reconsider Court's ruling regarding Mike Wesaw [486-1], motion to reconsider Court's ruling on admission of the transcripts of the 9/1/92 hearing and People v Vogt [485-1], motion to admit hearsay regarding the Joynts under FRE 804 [483-1], motion to bar testimony of special agent Bohnemeier [468-1], motion for in camera review of government memoranda of interview of Sandra Nations [461-1]. The Court finds the following motions MOOT: motion to bar proposed defense exhibits and defendant's supplemental list of exhibits [477-1], motion to admonish defense witnesses of privilege against compulsory self incrimination [465-1]. The Court SUSTAINS the motion in limine to exclude the testimony of defense witnesses Barney Miller, Bob Karras and Donald Dulle, Jr [478-1] Court Reporter Ann Taylor (jmf)
[Entry date 06/04/97]

APPENDIX I — TRANSCRIBED INTERVIEW OF BARRY MILLER

Q. by Mr. McDowell: First of all, you are here voluntarily, I am not making you be here or intimidating you?

A. by Mr. Miller: That is correct.

Mr. McDowell: My name is Larry McDowell, this is SPECIAL SERVICES File No. 970024. Ceto and same is the client and I am here with Barney Miller, who is the owner of Food Land at 5401 Collinsville Road, Fairmont City, Illinois.

Q. First of all, Mr. Miller, you are familiar with Bonds Robinson, Jr. in what way?

A. He goes back in years past — our liquor agent. I guess, Illinois State Liquor Control, and also served us pantyhose and a couple other side lines — grocery items that he sold, I guess, out of his car.

Q. Okay. When he would stop by here, I assume he would do some sort of liquor control inspection or just an update?

A. Well, you know, more likely liquor control when they come in they do a full inspection and have an inspection report that we sign. You know like, just had one maybe three or four weeks ago. In years past, I don't ever remeber seeing any forms or anything like that other than knowing that this fellow was the liquor control agent. Be on our toes, make sure we're followin' all the rules, make sure we got our signs posted whatever.

Q. So, Mr. Robinson was your liquor control agent. He never had you sign a form or anything?

A. Not to my knowledge.

Q. Okay. How long ago did you first start seeing Mr. Robinson as your liquor control agent?

A. Probably a year or two after we opened the business. Probably somewhere in the — '87, '88 range, somewhere in that time frame.

Q. Okay. And your understanding was that he was an Illinois Liquor Control Agent and he used to come in here and enforce the Illinois Liquor Act?

A. That's correct.

Q. Okay. And you said that when he would come in here and do that, he would also sell you pantyhose?

A. It was more or less, "Oh, by the way boys, I've got a —," you know, "You're in an ethnic neighborhood, I've got a great line of ethnic pantyhose, which would be a natural. All the other stores that I've got them in sell 'em great, you can't miss. I'll stock 'em, I'll price 'em, I'll do everything for ya. Then I'll give you a good price."

Q. Okay. And he would just — at any point did you feel like you kind of had to? Was this a product you would have carried anyway?

A. Probably if it was a different . . . if it was Joe Blow off the street, I'd probably not done the deal. There probably would, you know, he pretty much would load the stuff on inventory, you know, that if it was a normal vendor, I'd say hey, I don't need $500.00 worth of pantyhose at a time. Could have been on a term basis, but being the liquor — I just — then felt pressure that don't give him any shit unless _____.

Q. Right. He — how often would he make his stops by here?

A. Oh, maybe, once every couple two or three months.

Q. Would he restock the items when he did that?

A. Yes. Uh huh.

Q. Okay. So, he restocked the items. Did he ever — did you ever feel that you had to buy more pantyhose than you really needed? Were they selling good — at the proper pace for him to stock them?

A. Suttle pressure — er, unspoken pressure, I guess. Felt pressure.

Q. Okay.

A. You know when it was a psycological, you know, feeling or whatever.

Q. As you said that as recent as three weeks ago a different liquor control agent has come by —

A. Uh huh.

Q. And he has you sign a report?

A. Well, just that, you know, it was like, hey, I'm your Illinois Liquor Control guy. Need to do a full check for your license. What are you doing with this, what are you doing with that. Where are your liquor invoices. Everything that I would have expected, you know, from a liquor check from — by the state.

Q. Okay. Earlier I had mentioned to you that there is a lawsuit, the United States of America versus Amiel Cueto. You really didn't seem to know too much about that case.

A. ———————— evidentrary hearing, you know, months back. ———————— problems in the Washington Park ———————— never worried about it.

Q. Okay. As far as the same business? Do you know anybody else who might have experienced the same thing? Do you have any friends in this business that have had dealings with Mr. Robinson.

A. Not really. Pretty much an independent grocer coming out of the chain stores ———————— river. Didn't know any other independents in East St. Louis or Washington Park.

Appendix I

Q. Are you still at this time carrying the pantyhose that he sold you? ————————?

A. No.

Q. How long ago did that stop?

A. A number of years ago, probably two or three years ago, something like that.

Q. Was that by your decision or by — is Mr. Robinson still in the pantyhose business, do you know?

A. I have no idea. Its kind of like did never see him.

Q. Okay.

A. You know.

Q. Okay. So, I mean — you just maintain the stock and sold it out —

A. Sold it out.

Q. Okay.

A. And haven't heard or seen him since.

Q. Okay.

A. ————————————————.

Q. When — when you paid him for the pantyhose he stocked, did you make a check out to him or did you pay him cash?

A. To the best of my knowledge, he was always paid at the courtesy counter, COD type of delivery, so I would imagine would have, you know, got boxes of records that, you know, my best guess would have been paid him cash.

* * * *

APPENDIX J — TRANSCRIBED INTERVIEW OF ROBERT KARRAS

Mr. McDowell: Today's date is April 11, 1997, it is approximately 10:30 a.m., and I am at 5111 West Main Street, in Belleville. I am sitting here with Bob Karras. He is going to give me information regarding Bonds Robinson. Special Services file number 970024.

Q. Mr. Karras, your MI name is Bob Karras, K A-R-R-A-S; just as I spelled it?

A. Correct.

Q. Okay. Your address?

A. 4 South Crest.

Q. 4 South Crest, O'Fallon, Illinois?

A. Right.

Q. What is the zip code there?

A. 62269.

Q. And your phone number?

A. 632-2548.

Q. That's area code 618, correct?

A. Correct.

Appendix J

Q. Okay. Your current occupation?

A. I am an alderman for the city.

Q. City of O'Fatton?

A. Correct.

Q. Is there a certain district or ward that you work for?

A. Ward 4.

[2] Q. Ward 4. Okay. Also, you are the former manager of restaurant/bar called Chicago Bob's?

A. Correct.

Q. And where was that located?

A. 706 East Highway 50.

Q. Okay, and what kind of business was that?

A. It was a full service restaurant and sports bar.

Q. Okay. You did have a liquor license there?

A. Correct.

Q. Through the course of your employment at Chicago Bob's, did you have a chance to come across a gentlemen, or liquor control agent named Bonds Robinson?

A. Right. He was our liquor — our liquor inspector.

Q. Okay. And it was your understanding that he was supposed to come by twice a year or several times a year to do inspections; make sure your compliance was all liquor control rules and regulations?

A. Right.

Q. The first time that you met Mr. Robinson; what happened?

A. He just ran through the regular inspection; cited if any thing was contaminated; invoices — just regular . . .

Q. Okay. Do you remember when that might have been?

A. The first time I believe was in February of '92.

Q. February of '92. Okay. He came in several time after that with nothing different to report? He just came in on his regular liquor control inspections?

A. He came in — yeah, every few months he would come back in and go over the same report that he files every month — or every few months.

[3] Q. I am going to ask you to look at your records. I know you have copies of a field report that was left with you referring back to 12/9/93, when Mr. Robinson came back in. Can you describe what happened that time?

Appendix J

A. The last time I saw him, he had come in and was very intimidating. He was citing all sorts of violations. He said that there was insects in the liquor that I was unable to see and he began to empty the bottles of liquor out one at a time. He asked me if I understood what he was doing and I told him I didn't. He said they were contaminated bottles. He made references to me being from Chicago . . . I should know how things work here in St. Clair County and that I could make his job a lot easier for him and by the fifth bottle I told him that I understood what he was talking about and he stopped pouring bottles of liquor out.

Q. So, he poured out four and was working on number five. When he said, "You are from Chicago, you should know how things operate . . ." I can' t remember the exact quote. What did you take that to mean?

A. I understood that to mean being from Chicago, he was talking about how corrupt Chicago is and that I made the comment to him, "Is this where I take you out to lunch and we take care of things there?" And he said that, "It is not necessary to go out to lunch that we could just handle things right here if you want."

Q. Then what happened when he said, "We could handle things here?"

A. He told me I would see him at the next inspection. He also asked me if I had any use for panty hose. It was an off the wall comment like that I no idea what he was referring to. He repeated it, nylon stockings, and I told him that I had

no use at all for those — I run a restaurant and bar, I didn't know why he would even suggest something like that.

Q. So, basically that was the end of that conversation? He left and there was no money exchanged or you didn't have to -------- any type of bribe then, and you never saw him after that?

A. No. Never saw him after that.

Q. After that did you get a new liquor control inspector?

A. Right.

Q. Did you ever have similar problems with another liquor control inspector? [4] Did you ever have bottles dumped, insects found in bottles or anything like that?

A. Nothing like that whatsoever. We had one violation and it was a legitimate violation and I was cited for that.

Q. Okay. After the incident with Bonds Robinson and the panty hose incident, I'll refer to it as, what did you do then? Did you tell anybody?

A. I spoke with a friend of mine who knew of Bonds Robinson very well. He was a customer and he said if I ever have a problem with Mr. Robinson again to give him a call and he would be happy to come up and talk to him for me. He told me that his father was the police chief in Centerville, and that his father had called Mr. Robinson into his office and give him the option of either being fired or resigning

due to an allegation of rape being filed against him and . . . Mr. Robinson and his partner in the back of a squad car in Centerville.

Q. Okay.

A. I never had to call him to come back though.

Q. You have never seen Bonds Robinson since or had any contact with him?

A. I believe the last time I saw him was in December of '93.

Q. Okay. You had mentioned earlier that you are not aware of any other business men in the O'Fallon area who experienced similar problems?

A. No. I am aware of the KC Hall right down the street from me who had problems with him because of their amusement games in there.

Q. Okay. Chicago Bob's is closed now?

A. Right. It was sold to Memorial Hospital.

Q. Okay. When did that happen?

A. About seven months ago.

Q. Seven months ago. We are looking at the middle part of '96.

A. Right.

Q. Okay. That's all the information that I need at this time. I would like to [5] thank Mr. Karras for sitting here with me and this is the end of this interview. Thank you.

Q. A little bit of further information on the same interview with Mr. Karras. We were just, discussing what kind of liquor was poured out on Mr. Robinson's visit on 12/9/93 at 9:40 a.m. The report reads that cherry brandy, apricot brandy, creme de cocoa, blackberry brandy and another sweet liqueur were poured out. Mr. Karras, you mentioned to me that other bottles were poured out as well?

A. Yes. There was a bottle of Cutty Sark that was poured out.

Q. Is this report inaccurate as to what bottles were actually poured out?

A. That's correct.

Q. So, why would it be inaccurate?

A. Cutty Sark would not have had insects in it. That was the fifth bottle that was poured out. That's when I told Mr. Robinson that I understood what he was talking about and he stopped.

Q. You mentioned to me that there wouldn't be insects in a liquor like Cutty Sark because it is not sweet and insets aren't attracted to it.

Appendix J

A. I don't believe that I ever had insects in any bottles of liquor. I had stoppers with screens in all of my bottles.

Q. And the entire time that you were in business did you ever have a customer send a drink back and say that I have insects in there?

A. No. Never.

* * * *

APPENDIX K — GOVERNMENT'S MOTION TO BAR TESTIMONY OF BONDS ROBINSON

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRIMINAL NO. 96 CR 30070 SNL

UNITED STATES OF AMERICA

Plaintiff,

vs.

AMIEL CUETO,

Defendant.

GOVERNMENT'S MOTION TO BAR TESTIMONY OF BONDS ROBINSON, EXCLUDE DEFENSE EXHIBITS A-3, B-4, B-5, B-6, R-1 THROUGH R-8, AND TO DENY DESIGNATION AS AN ADVERSE WITNESS

Now comes the United States of America by and through its attorneys, W. Charles Grace, United States Attorney for the Southern District of Illinois, and Miriam F. Miquelon and Norman R. Smith, Assistant United States Attorneys, and submits the instant "Government's Motion to Bar Testimony of Bonds Robinson, Exclude Defense Exhibits A-3, B-4, B-5, B-6, R-1 Through R-8, and to Deny Designation as an Adverse Witness" and in support states as follows:

Appendix K

1. Defendant Cueto has designated Agent Robinson as his first witness and on Saturday, May 24, 1997, designated certain defense exhibits that may be related to Agent Robinson's testimony. Additionally, defense counsel has indicated that it will be filing a motion, albeit untimely, to designate Agent Robinson as an adverse witness.

2. The government seeks to bar certain testimony from being elicited by the defense from Agent Robinson and from introducing certain defense exhibits during Agent Robinson's testimony for impeachment purposes or otherwise. The adverse witness issue is dealt with separately hereinbelow

* * * *

APPENDIX L — EXCERPT FROM ORDER OF JUDGE WILLIAM D. STIEHL DATED MAY 18, 1993, DISMISSING *VENEZIA v. ROBINSON*

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

CAUSE NO. 92-CV-867-WDS

THOMAS VENEZIA,

Plaintiff-Petitioner,

v.

BONDS ROBINSON, JR.,

Defendant-Respondent.

MEMORANDUM AND ORDER

STIEHL. Chief Judge:

Before the Court are defendant's motion to dismiss. and a separate motion to dissolve the preliminary injunction entered in state court.

BACKGROUND

On September 1, 1992, the plaintiff filed a petition for a temporary restraining order. a preliminary, and a permanent injunction, against the defendant in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois. On the same morning. at approximately 9:15 a.m.. defendant was

served with a subpoena to appear before the Honorable James Radcliffe at 9:30 a.m. for an unspecified hearing on the action of "Venezia v. Robinson." Notably, the subpoena did not identify the action by a cause number, but only by that title. In addition, although stamped with the court seal, and signed by a deputy cleric, the subpoena was not dated. On September 1, 1992, at 10:30 a.m.. after a hearing, a preliminary injunction was entered by Judge Radcliffe.

* * *

Defendant's motion to strike, and plaintiff's motion to compel are **DENIED** as moot.

IT IS SO ORDERED.

DATED: 18 May 1993

s/ William D. Stiehl
Chief Judge

APPENDIX M — EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT BEFORE THE PANEL OF THE SEVENTH CIRCUIT, DATED MAY 11, 1998

No. 97-3439

USA,

Plaintiff,

vs.

AMIEL CUETO,

Defendant.

REPORT OF PROCEEDINGS
May 11, 1998,
ORAL ARGUMENT

[10] * * *

MR. DERSHOWITZ: It is not — well, it's — it's in Count I, but it's not — it's not — it's one of the overt acts in Count I.

JUDGE #1: Yes.

MR. DERSHOWITZ: Yeah. Yeah. But that — that wouldn't be a basis of our argument because that would be an argument about insufficiency of the evidence.

* * * *

APPENDIX N — LETTER CUETO WROTE TO STATE'S ATTORNEY HAIDA ON JUNE 15, 1994, MARKED AS GX 28-13

CUETO, CUETO & CUETO, Ltd.
Attorneys at Law
7110 West Main Street
Belleville, Illinois 62223

* * *

June 15, 1994

Mr. Robert Haida
State's Attorney
St. Clair County Building
10 Public Square
Belleville, IL 62220

Dear Bob:

Enclosed please find pages 45-32 of the transcript in *People v. Voct*, testimony taken on July 23, 1993. I have marked in red thirteen answers given by Bonds Robinson, Jr., each one of which was false. Robinson was under oath and knew the testimony he gave was false. This is not the only perjury by Robinson, but it is a start. As Tony Joynt's lawyer told you, Tony will testify if he is compelled to, that he loaned Robinson $500.00, and that he "bought" pantyhose from Robinson's wife. Tony will claim the Fifth Amendment, however these loans and purchases are beyond the statute of limitations; moreover Tony did nothing wrong. If anything, he was a victim of Bonds Robinson's remorseless extortion.

Appendix N

Bob, when we discussed this last October, I thought we agreed that you would call Tony to the Grand Jury in November or December. In our discussion last week, you told me that that would be done in July (next month). I would ask you to please keep me informed. It is very important to my client's legal position that Robinson be brought to justice as soon as possible. If you need anything else from me, please give me a call.

Very truly yours,

CUETO, CUETO & CUETO, LTD.

s/ Amiel Cueto
AMIEL CUETO

AC/js Enclosures
Enclosures

APPENDIX O — REDACTED VERSION OF THE JANUARY 30, 1995 EDITORIAL MARKET AS GOVERNMENT EXHIBIT 28-2A

January --, --

GOVERNMENT
EXHIBIT
28-2A
96-20070

MENT

LOCAL JUSTICE DEPARTMENT NAZIS WHO ALSO MAY BE PROSECUTED BY STATE AUTHORITIES

Here in St. Clair County we have a home-grown group of Justice Department Nazis. (See "Glossary of Terms" on page 7). Two of these - Hitler Youth member of the U.S. Attorney's Office and FBI-Nazi Donald Taylor threatened State's Attorney Robert Haida last summer. As *East Side Review* has extensively reported, Haida had a lead-pipe cinch perjury case against FBI surrogate. Bonds Robinson, Jr. The two federal Nazis and Taylor threatened to frame Haida on a phony "Obstruction of Justice" charge in order to prevent the indictment of Robinson. The threat has worked, so far.

But and Taylor have violated the criminal laws (Intimidation: 720 ILCS 12-6, which is a Class 3 Felony) of the State of Illinois. Just because these two particular Nazis have Justice Department badges, doesn t make them immune from prosecution for their state-law crimes.

The state prosecutors in Idaho may have the courage to prosecute the federal Nazis who murdered Vicki and Sam Weaver. The citizens of our community will be wondering whether our local Nazis will be brought to justice as well. Maybe Haida himself doesn't have the courage to prosecute them, but that doesn't mean these Nazis will escape prosecution. Haida's soon-to-be successor is known to dislike Nazis - in fact he doesn't like them at all. We might be in for an interesting two years. Stay tuned to *East Side Review* for complete updates on this continuing story.

APPENDIX P — EXCERPT FROM JANUARY 30, 1995 EDITION OF THE EAST SIDE REVIEW, EDITORIAL AS CUETO WROTE AND PUBLISHED IT, ENTITLED: LOCAL JUSTICE DEPARTMENT NAZIS WHO ALSO MAY BE PROSECUTED BY STATE AUTHORITIES

ews, Analysis and Opinion From A Different Perspectiv

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ry 30, 1995

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